# American Bar Association Journal



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# American Bar Association Journal

*the official organ of the*

AMERICAN BAR ASSOCIATION

*published monthly*


The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement of a member of the Association in good standing and are considered in each case by a Committee on Admissions of the appropriate state. If the applicant is a member of the Bar of the state or territory in which he resides or has his principal office, or is a member of a federal, state or territorial court of record of a state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of such states or territories. If, however, the applicant is not a member of the Bar of the state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of those states or territories or is referred to the Committee on Admissions for a state or territory in which the applicant formerly resided and to the Bar of which he was admitted. Upon the approval of an application by a majority of the proper Committee on Admissions, an applicant is deemed nominated for membership. All nominations made pursuant to these provisions are reported to the Board of Governors for election. Four negative votes in the Board of Governors prevent an applicant's election.

Effective July 1, 1952, dues are $16.00 a year, except for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the following Sections: Bar Activities, Criminal Law, Judicial Administration, Legal Education and Admissions to the Bar, and the Junior Bar Conference. Dues for the Section of Antitrust Law, the Section of Labor Relations Law and the Section of Patent, Trade-Mark and Copyright Law are $5.00 a year; dues for the Section of Taxation are $6.00 a year; dues for all other Sections are $3.00 a year.

Blank forms of proposal for membership may be obtained from the Association offices at 1140 North Dearborn Street, Chicago 10, Illinois.

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# CURRENT OUTLOOK

American
Bar Association
Journal
★
June 1952

## • Jubilee Year of the American Bar Association

On August 21, 1953, it will be seventy-five years since seventy-three lawyers from eighteen states and the District of Columbia met at Saratoga Springs, New York, to organize the American Bar Association. President Barkdull has appointed a Jubilee Committee with Past President George Maurice Morris, of Washington, D. C., as Chairman, to make preliminary plans and to report back to the Board of Governors with respect to the Diamond Jubilee celebration.

The Annual Meeting that year will be in Boston, opening officially on August 24 at the Statler Hotel. The Boston Bar Association Committee, with Reginald Heber Smith and Allan H. W. Higgins as Co-Chairmen, is planning many special commemorative events to which historic Boston is uniquely adapted. It was at Boston that the Association organized a federated, representative House of Delegates in 1936.

Over the history of a profession as ancient as ours, seventy-five years is not such a long time. Other organizations are older than that. Some bar associations are older. But, today there is no other national organization toward which the public can look so confidently for unbiased, informed and competent counsel or which has the prestige and weight of the American Bar Association. As our Jubilee Year approaches—in this newly industrialized and mechanized society—in a country confused by organized crime, by corruption, by wars, by inflation and disputed economic factors and theories—in a world divided on the single sharp issue of materialistic communism—every lawyer should be proud that the organized Bar, of which he is an indispensable part, is ready to live fully up to its history and destiny of leadership in the community, the state and the nation.

## • Lawyers want Regional Meetings

Lawyers, like members of the medical profession, have learned to combine a vacation with postgraduate work in order to prevent the practitioners' training from becoming obsolete, while deducting the attendant expense from income tax. For busy professional people, other kinds of vacations are becoming impracticable. Participation in bar association work has become a vital part of every good lawyer's professional life. Virtually the last group in America to organize, the lawyers are catching up rapidly.

At Atlanta, Dallas and Louisville, the Regional Meeting programs were all capacity smash hits. At the Yellowstone Park Regional Meeting, W. J. Jameson, Meeting Director, of Billings, Montana, reports that available accommodations will be sold out by June 17 when the Meeting begins. The practice of lawyers of bringing their wives has increased rapidly. Now, it is not unusual for them to bring their children and whole families are going to the Yellowstone Meeting.

On the recreational side, what can compare with rubbing elbows and exchanging experiences with other lawyers and their families who have common intellectual and economic interests—all refined and screened by the processes of legal education and practice—and in the most beautiful spots in America?

There can now be no question that lawyers want that program of bringing the far-ranging work of the organized Bar of America to the local lawyer on both the public and the professional sides to supplement and correlate the work of the state and local Bars.

Much remains to be done to perfect the program to fit the precise needs of large and small law offices and bar associations. For example, more work must be done in the small law office management field where so many solo and small partnership practitioners are finding efficiency difficult in the face

of a devalued currency and the increasing demands of their clients for expertness in a multitude of new fields.

On the other hand, the intensive program at Louisville crowded out much highly desirable work. The National Conference of Bar Presidents, public relations and other bar activities meetings were planned, but cancelled because of severe competition for time.

Gradually the lawyers are determining just what they most need and desire and the associations are finding the best ways to provide those programs for all alike, to the end that the profession and the public will be better served than ever before.

## • Is your bar association work in arrears?

If your practice leaves you too little time to perform that part of your obligation as a lawyer known as bar association work, that obligation can be fulfilled. Total inactivity, nonfeasance or delay or default in assignment performances are unfair to your fellows who do their share for the benefit of all, as a matter of conscience. Organization and method will provide the answer.

Write your bar president what your interests are and offer to help. When assigned, don't abdicate to the chairman, but get his permission to be responsible for something definite. Next, look in some general book such as "Handbook for Bar Association Officers", by Glenn R. Winters of Ann Arbor, Michigan, (final printed draft to be available this September). Or, try our "Section Handbook", or our "Public Relations for Bar Associations", or the catalogue of reports of the Survey of the Legal Profession, 37 A.B.A.J. 650; September, 1951. Thereafter you need not exhaust your energy and resourcefulness in a vacuum. Just as you find the answer to your legal questions by precedent, so you proceed to solve bar association problems. Whatever you want to do has probably been done before, to some extent, by someone else. Just as you would not ask another lawyer to look up your law, you need not ask your friends how to go about accomplishing the work of your Committee or Section. An index will usually point the way to an answer in either kind of work. For example, your *American Bar Association Annual Report* contains indices to full reports of everything the American Bar Association has done each year and everything covered by the *American Bar Association Journal*. The usefulness of these indices is not to be underrated. Here is a wealth of material which will likely solve or provide endless clues to the solution of the majority of such problems in any association. Each December issue of that *Journal* has an annual topical index, also. In other associations, most bar journals carry cumulative indices. Your secretary may find a current report of the activity you are looking for. Busy lawyers often have their juniors, secretaries or librarians preread and blue-pencil periodicals on the basis of listed interests.

One of your best sources is your bar executive or secretary whose experience and memory will usually turn up something somewhere relevant to your undertaking. Nearly all state and metropolitan bar officers make it their business to service such inquiries. A constant stream of inquiries comes to our Association headquarters on every kind of subject. Every effort is made to respond constructively, but it will take time to develop this service fully on a national basis.

The American Bar Association plans to build as soon as possible, a clearing house library of such material, journals and reports to be indexed, cross-indexed and collated, so that a whole bibliography of material on your bar problem will be immediately accessible. It is a monumental undertaking to produce such a consolidated master index, but some of its components are at hand now.

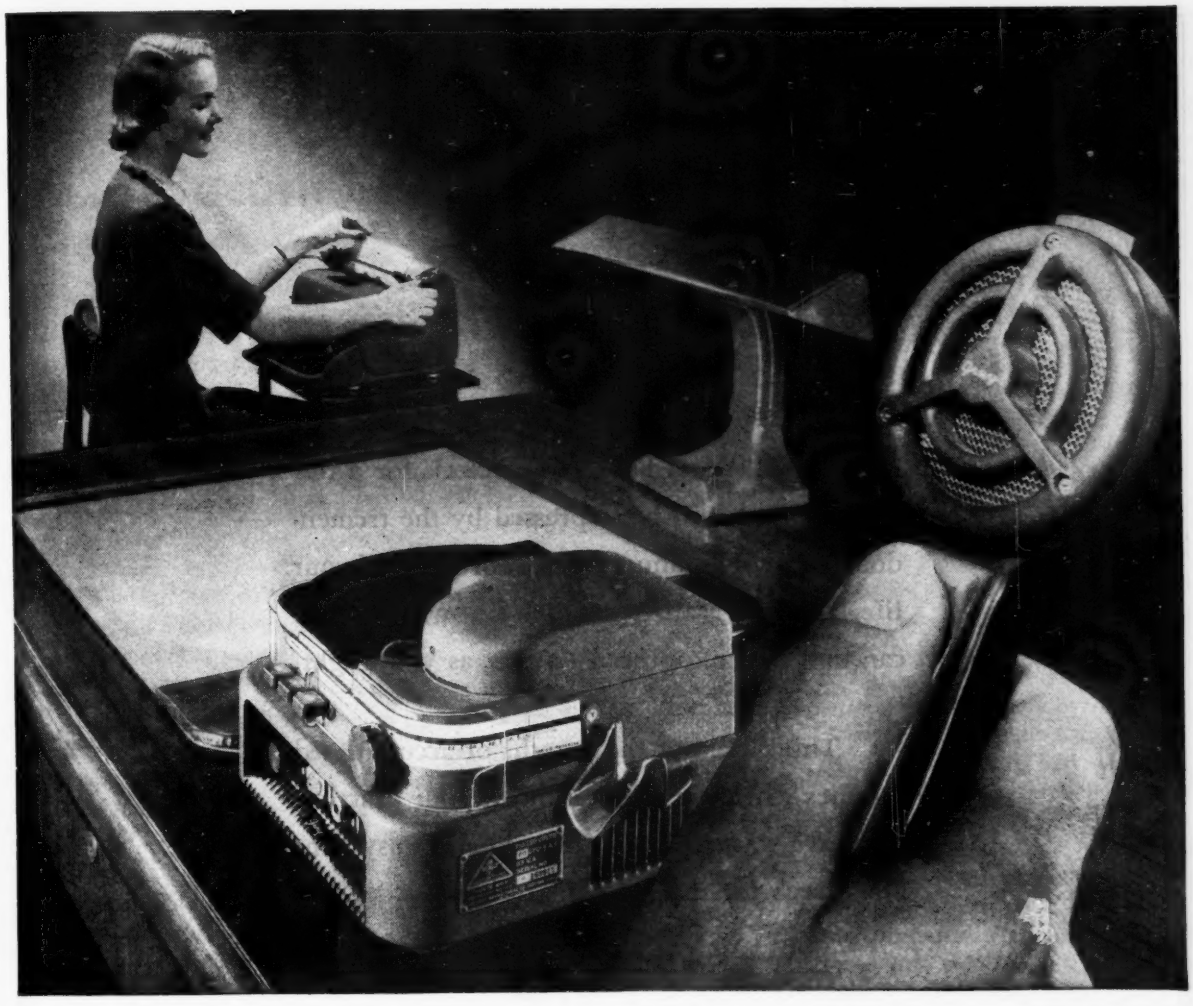
Edward B. Love
*Director of Activities*
Editor-in-Charge

### Manuscripts for the *Journal*

■ The JOURNAL is glad to receive from Association members any manuscript, material or suggestions of items for consideration for publication. With our limited space we can publish only a few of those submitted, but every article we receive is considered carefully by members of the Board of Editors unless for some reason it is plainly unsuited for our publication. Articles in excess of 3000 words including footnotes cannot ordinarily be published; exceptions are sometimes made as to solicited contributions. The facts stated and views expressed in any article identified with an individual author are upon his responsibility.

Manuscript must be typewritten originals (not carbon copies) and must be double or triple spaced, including footnotes and any quoted matter. The Board of Editors will be forced to return unread any manuscript that does not meet this requirement.

As the work of the Board of Editors is carried on by men who are widely separated in distance and busy in their own professional pursuits, time often elapses before a decision can be made as to whether a proffered article is acceptable and space can be made available for it. We cannot assure that submitted manuscripts not accepted will be returned, although that may usually be done. Because of the small size of the JOURNAL staff, unsolicited manuscripts cannot always be immediately acknowledged, although every effort will be made to do so. A period of four or more weeks is usually required for consideration of material; some manuscripts may require more time for consideration because of the nature of their subject matter.



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# Social Security and Retirement Plan for Lawyers:

# It Need Not Mean Socialism

by **Harold O. Love** • of the Michigan Bar (Detroit)

■ This article is a report prepared for the Survey of the Legal Profession. The Survey is securing much of its material by asking competent persons to write reports in connection with various parts and aspects of the whole study.

Reports are released for publication in legal periodicals, law reviews, magazines and other media as soon as they have been approved by the Survey Council's Committee on Publications.

Thus the information contained in Survey reports is given promptly to the Bar and to the public. Such publication also affords opportunities for criticisms, corrections and suggestions.

When this Survey has been completed, the Council plans to issue a final comprehensive report containing its findings, conclusions and recommendations.

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■ Existing social security legislation excludes from its benefits self-employed persons such as lawyers. Similarly, a self-employed individual is not permitted to participate in any retirement program he might set up for his employees under the provisions of the Internal Revenue Code. In neither case is complete protection against socially created risks provided.

Is it the fundamental obligation of society to provide that protection, or is it the personal duty of each individual? It is suggested in this article that members of the legal profession promote a twofold program: one amplifying and extending present social security legislation into a unified federal system in order to provide adequate minimum protection for all against socially created risks; the other establishing legislation that would encourage the individual to set up for himself a tax deductible program that would enable him, upon retirement, to continue a standard of living comparable to that enjoyed by him during his productive years and assist his family to maintain that standard after his death.

### Industrialism Changes Economic Basis of Society

Until the twentieth century, it was thought that everyone in the United States could and should, by his own efforts and savings, provide for himself and his dependents. This point of view was compatible with the agrarian culture that existed prior to that time. With the development of industrialism, forces emerged that introduced economic hazards resulting in want which were, in varying degrees, beyond the control of the individual.

At first, these difficulties were met by public and private charity. In 1929, the blow fell and there was a complete reversal of public opinion. Individual security was recognized as a problem for society as a whole, and in 1935 Social Security legislation was enacted by Congress. That Social Security Act, as subsequently amended, is looked upon in the United States as being synonymous with the term "social security".

The primary economic hazards, all of which involve the loss or interruption of earning power and income necessary to sustain life are these:

1. Disability, through accident or sickness;
2. Involuntary unemployment, or in case of self-employed or professional persons, loss of livelihood;
3. Loss of capacity for work because of old age;
4. Loss of family income through death of the breadwinner.

To these could be added numerous other minor causes of want, which will not be considered here. "Social Security", as used hereafter in this article, will refer to a specific program designed to afford protection against want resulting from these primary economic hazards.

### Social Security Protection Is Presently Inadequate

At present, such protection is very inadequate. For example, disability, caused by accident or sickness, is met in most states only by legislation

providing compensation for industrial disability. This benefits only a small portion of the working population. A few states, for example New York and Rhode Island, have enacted compulsory health insurance legislation.

Lawyers, in common with other professional persons, always seem to be excluded from the benefits of such legislation. For that reason, various bar associations are setting up group accident and health insurance plans. Some which have come to the writer's attention are those of the Illinois, Iowa, Michigan and Ohio State Bar Associations and that of The Association of the Bar of the City of New York.

The Social Security Act itself does not provide relief for interruption to earning power brought about by involuntary unemployment. That act merely establishes the federal tax basis for state laws, whereby benefits are paid on wages previously received. Contributions to the fund are made in most states by the employer alone through a tax on payrolls. In some states, the contributions are made by the employer and the worker. The Federal Government makes no contribution whatever.

The Act does supply an old age insurance and also affords assistance to aged persons not entitled to such old age insurance. The latter is provided by federal grants to the various states having old age assistance programs.

The 1939 amendments to the Social Security Act provide benefits to survivors in case of the death of breadwinners, but these are based in part on contributions paid into a fund.

Prior to recent amendments, approximately 50 per cent of the working population in the United States were excluded from any benefits under the Social Security Act. Among those not benefited were the self-employed. The Social Security Board stated, "Self-employment was excluded from old age insurance under the 1935 provisions of the Social Security Act largely because of the need for developing administration experience in the less difficult field of wage employment in which both wage reports and contributions could be collected through employers."

| Number of Persons in Firm | Per Cent of Lawyers in Firm of this Size | Mean Net Income | Median Net Income |
|---|---|---|---|
| 1 (solo practitioner) | 73.6 | $ 5,759 | $ 4,275 |
| 2 | 14.7 | 8,030 | 6,500 |
| 3 | 4.9 | 12,821 | 9,477 |
| 4 | 2.1 | 16,614 | 12,500 |
| 5-8 | 3.4 | 20,467 | 16,833 |
| 9 or more | 1.3 | 27,246 | 21,500 |
| | 100.0 | 7,437 | 5,199 |

### Recent Amendments Still Exclude Self-Employed

Even recent amendments of the Act, providing increased coverage, still exclude self-employed professional men, such as lawyers. It is suggested that the reason for such exclusion lies in a hangover of the old belief that the self-employed professional man is better able to take care of himself. It is a common assumption that the self-employed person has an income from investments that continues after he stops working. That is not generally true. A vast majority of self-employed professional people earn little more in net income than employed persons. They are no more able to save for the future out of their small incomes, yet they have the same needs to meet when livelihood is lost.

The United States Department of Commerce reports lawyers' 1947 net incomes after office expenses but *before* federal income taxes as shown in the table above.

It is plain that the individual practitioner and those in small firms —constituting 90 per cent of all lawyers—*after* paying income taxes have little or nothing left to put aside for old age. In short, plans designed to help the legal profession are intended primarily to help "the little fellow". The large and established firms which, although unincorporated, have achieved institutional strength and continuity, are able to hande these problems in other ways.

While it was the 1929 collapse that caused the reversal of public opinion about security, there is another factor which for our purposes here is just as important. It is the enormous increase in taxation and especially in the federal surtax rates.

### High Income Taxes Prevent Purchase of Annuities

It is almost impossible today for younger lawyers to do what their predecessors at the Bar could do a generation ago in the way of buying insurance and annuities for themselves. The younger men are today compelled to pay in *increased taxes* far more than the older men paid as premiums for their insurance and annuities.

Today, our present rate of taxation makes it difficult for anyone to achieve even a modest degree of security by accumulation of reserves through private initiative. This certainly does not conform with a national policy of security for all. The self-employed lawyer thus finds himself unable to provide his own social security, and yet is excluded from coverage under the terms and provisions of the Social Security Act.

Would extension of present social security legislation to self-employed professional persons, such as lawyers, be desirable? Such an extension would present no more problems than are encountered with those self-employed persons presently covered. Necessary data could be made

a part of the income tax return. It would then be comparatively simple to determine how much income is due to self-employment, as distinguished from return on investments. Market value of services could also be used as a method of determining what should be considered earnings. The rate of contribution on such earnings could be one equal to the combined employer-employee rate.

Lawyers who have attempted to set up a program for social security through private initiative have proposed a great many plans which do not involve extension of present Social Security legislation. These writers, confusing social security with retirement plans, have based their proposals on provisions of the Internal Revenue Code relating to employees' retirement trusts. One writer suggests that the income tax benefits of pension and profit-sharing plans be extended to partners and individual proprietors.[1] He urges this approach on the ground that, while a corporate owner of a business who is also an employee, may include himself in the corporation's pension plan, there is discrimination against persons in a similar field doing business as sole proprietors or partners. This is because individual proprietors and partners are not considered "employees" under the Code.

In commenting on the previous proposal, another writer proposes that there be allowed as a deduction from gross income that part of any taxpayer's earned net income, not to exceed 15 per cent of such income, or $7,500, whichever is smaller, which is set apart by him in a separate fund that will make it possible for him to build up financial security for himself and his family.[2] Like the income from a Section 165 employees' trust, the income from such a fund would be exempt from tax; but distributions from the fund would be taxable to the earner or his surviving family when withdrawn from the fund. It would be provided that upon the death of the taxpayer, the undrawn balance of the fund must be used to purchase annuities for the benefit of a member or members of the decedent's family.

Another lawyer suggests modifying the foregoing plan by establishing a maximum retirement benefit of an amount equal to 25 per cent of taxpayer's earned net income, but not more than $10,000 in any event, and inserting a requirement of investment in a special type of nonassignable, low or no-interest-bearing United States Government Bonds.

Thus, we have been offered two solutions to the problem of social security for the self-employed: the extension of the provisions of the Social Security Act or the expansion of the Internal Revenue Code provisions relating to pension trusts. Which would insure the more adequate protection? Or is there still a better solution?

### Majority of People Favor Social Insurance

The writer believes that the majority of people in the United States today are convinced that comprehensive and adequate provisions for social insurance are essential to national and individual security in the circumstances of modern life; that such provisions are in accord with the traditions of democracy and individual enterprise which we have always cherished; and that social insurance can make it possible for the great majority of all families to meet the common risks of the modern economic system over which they have little or no control. This majority feel that it is the fundamental obligation of society, under the present economic system, to provide security against socially created risks.

A minority believes the exact contrary, *i.e.*, that it is the fundamental duty of each individual to provide for his own security. These persons feel that to place such an obligation upon society as a whole kills initiative, encourages indolence and ultimately leads to socialism.

Such a conflict of opinion should not exist. The positions of both the majority and minority are sound, and one should not be held to the exclusion of the other. A strong nation must base its social system on a combination of both tenets. Let us of the legal profession now initiate and support legislation designed to include both the minority and majority positions. Let us create security for all, including lawyers, through the two following programs:

A. A progam which would provide security against socially created risks, through the establishment and maintenance of protection necessary to assure adequate minimum protection under all circumstances. This can be done by amplifying and extending our present social security legislation into a unified federal system to: 1. Cover all the people in the United States; 2. Provide protection against those economic hazards involving the loss or interruption of earning power and income necessary to sustain life; 3. Pay benefits for the entire period of need, not just for a stated period of

Paul Gach

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1. Nicholson, "Pensions for Partners: Tax Laws Are Unfair to Lawyers and Firms," 33 *A.B.A.J.* 302.
2. Rudnick, "More About Pensions for Partners", 33 *A.B.A.J.* 1001.

time; and 4. Establish benefits sufficient to maintain *a decent minimum standard of living*. Thought should be given toward considering the cost of such a program as an expense of operation against current national income, rather than a claim against the workers' or employers' current income.

Let those who would object to such an extension of the Social Security Act on the grounds that they would be paying for the benefits of others ask themselves if they object to legislation permitting certain tax benefits for persons participating under qualified pension plans. Each of us today paying income tax is bearing a share of the cost of each pension plan in existence. The deferring of income tax on contributions to pension plans until "distributed or made available" to the employees increases the present tax load on each dollar of our current income upon which income tax is not deferred. In other words, income tax laws in the interest of social security have encouraged creation of pension trusts by granting them special tax privileges at the expense of taxpayers who are not the beneficiaries of such trusts.

This point of unfair tax discrimination needs to be made brutally plain. Let us imagine two classmates, Brown and White, who have the same ability and graduate with the same grades from a good law school. Brown goes into the legal department of the Life Insurance Company and White goes into a law firm which is general counsel for the same Life Insurance Company. Fifteen years later Brown has worked up so that he is head of "house counsel" for the company and earns $20,000. White also has worked up in his firm and is chief of "outside counsel" for the company and earns $20,000.

Brown is protected by a retirement pension plan. He and his family are safe. The company pays the premium year by year. Also, year by year, the company deducts the amount of that premium on its income tax return as a business expense. This is all lawful and proper. The point is that it costs Brown nothing.

White, as a lawyer, is prohibited from incorporating his business. Hence he practices in a partnership. A partner is an employer. Hence White is a self-employer. If he tries to set up a retirement plan, it will be at his own expense. The premium he pays year after year he cannot deduct on his income tax return because it is regarded as a *personal* and not a business expense.

This discrimination White finds it hard to justify on rational grounds. Fortunately for his peace of mind it seldom dawns on him that, in addition to everything else, he is helping to make up for the cost of the premium which, year by year, is providing Brown with his retirement security.

B. Having provided adequate minimum protection for everyone against socially created risks, let us try to design legislation that will encourage the individual to set up a program enabling him, upon retirement, to continue a standard of living more nearly comparable to that enjoyed by him during his productive years, and to assist his family to maintain that standard after his death.

Such a program would allow the individual to set up a fund guaranteeing him, at retirement, or his family, in case of his death, a standard of living equal to 75 per cent of that previously enjoyed. The contributions made to such a fund could be deductible from current income tax in the year in which they are made, and should be invested in government bonds or life insurance policies. Benefits should be taxed to the recipient when distributed or made available. Such a plan would certainly stimulate initiative, and at the same time discourage indolence or further progress toward undesirable socialism.

The first program, which advocates amplification and extension of social security legislation to cover all people in the United States and to provide minimum protection under all circumstances, is still far away, although recent amendments to social security legislation have provided increased benefits and extended coverage.

As to the second program, designed to encourage an individual to set up a program which will enable him, upon retirement, to continue a standard of living more nearly comparable to that enjoyed by him during his productive years and to assist his family to maintain that standard after his death, little progress has been made.

Nathaniel L. Goldstein, Attorney General of the State of New York, in the June, 1951, issue of the AMERICAN BAR ASSOCIATION JOURNAL, declares that professional men are at a disadvantage in providing security for themselves and their dependents when their productive years are over or when they wish to retire. In referring to the problems of the professional man, he states, "His income is all earned and subject to the crushing weight of high surtaxes in the short period when his long years of effort come to fruition." Mr. Goldstein believes those who earn their income by personal practice of the professions should be permitted to project a *limited* proportion of their earnings to the future, so that they might escape the full impact of the surtax on peak earnings and be enabled to establish a secured fund for retirement.

He proposes a plan, the basic features of which would be:

1. Allow the taxpayer to exclude from gross income in any taxable year prior to attaining age 65, an amount invested in special United States government bonds.
2. Limit the amount which may be so invested in any one year to $10,000 or 15 per cent of earned net income in the practice of his profession, whichever is less.
3. Provide that the bonds shall be nonnegotiable, nonassignable and shall not bear interest.
4. Permit the bonds to be redeemed only upon attainment of age 65 and at any time during the life of the taxpayer thereafter or at death.

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# The Treaty-Clause Amendment:

# The Case for the Association

**by George A. Finch** • of the District of Columbia Bar

■ In this article, Mr. Finch, editor-in-chief of the *American Journal of International Law* and a member of the American Bar Association's Committee on Peace and Law Through United Nations, sets forth the scope and intendment of the proposed constitutional amendment to limit the treaty clause of the Constitution. The amendment was drafted by the Peace and Law Committee and was approved by the House of Delegates at the Mid-Year Meeting in Chicago last February. Mr. Finch's article is an authoritative statement of the Committee's reasons for sponsoring the amendment.

■ The House of Delegates of the American Bar Association at its meeting in Chicago on February 26 adopted a resolution to recommend to Congress an amendment to the Constitution of the United States reading as follows:

> A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect. A treaty shall become effective as internal law in the United States only through legislation by Congress which it could enact under its delegated powers in the absence of such treaty.

This proposal has three objectives: (1) to render void any treaty in conflict with the Constitution; (2) to prevent any treaty from becoming self-executing as internal law until Congress acts, thus bringing the position of the United States into harmony with that of the great majority of nations; and (3) to confine Congress in legislating under treaties to those powers which it has in the absence of a treaty; in other words, to make it clear that Congress cannot acquire additional legislative power under a treaty that it does not otherwise possess and thus preventing treaties from upsetting the balance between state and federal power.

The first sentence will expressly incorporate into the Constitution an interpretation that the Supreme Court in a number of *dicta* has stated is now implied in that fundamental instrument of government. On the other hand, many judicial and other statements have been made that no treaty has ever been declared unconstitutional, with intimations that the treaty-making power is not derived from the Constitution but from inherent sovereignty —a confusion between the status of a government under international law, on the one hand, and its status as a matter of domestic constitutional law, on the other hand. The first sentence of the proposed amendment will permanently resolve these theoretical conflicts.

There is much misunderstanding regarding the application in the internal affairs of the United States of decisions of the Supreme Court regarding the powers of the Federal Government inherent in sovereignty. For example, Mr. Justice Sutherland, speaking for the Court in *United States* v. *Curtiss-Wright Export Corporation*, 299 U.S. 304-318 (1936), stated that "the investment of the Federal Government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution". Citing a number of previous cases based on the law of nations, the learned Justice continued: "This court recognized, and in each of the cases found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations . . . . As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family."

### Curtiss-Wright Case Confuses Concepts

Properly understood as applying to the totality of powers of the Federal Government in all its branches, these are but commonplace statements of accepted principles of international law. The confusion arises from the fact that in the *Curtiss-Wright* case the Court was not dealing with international law but with the validity of the delegation of an unchallenged legislative power to the executive under the

Constitution of the United States. The treaty-making power was not involved. Regardless of any implication that may be drawn from such statements, the correct view is that the treaty-making power in its application to the internal affairs of the United States is a delegated power and is not founded on the theory of inherent sovereignty. "Limitations upon the exercise of the treaty-making power are due to the fact that the power itself rests in grant, and being one of the delegated powers, stands on no higher footing than any of the other powers delegated under the Constitution, and, as the power to amend the Constitution is distinct from the treaty-making power, it cannot be exercised to the detriment or exclusion of the other provisions of the Constitution." (Report on the Extent and Limitations of the Treaty-Making Power, by Chandler P. Anderson, Counsel and Adviser to the State Department, made to and approved by Secretary of State Elihu Root.) Mr. Anderson did not deny the inherent attribute of the sovereign power of an independent nation to make treaties upon every question pertaining to international relations, but he could not admit that the treaty-making power in the United States exercised the sovereign power of the nation as a whole. "When, however, the treaty-making power is not exercised by the sovereign power of the nation as a whole, but has been delegated to a branch of the government by which it is exercised in a representative capacity, the treaty-making power there, although it arises from sovereignty, rests in grant, and can be exercised only to the extent of and in accordance with the terms fixed by the grant." (Report cited above, published in 1 *American Journal of International Law* 636 (1907). See also the same author "Treaties as Domestic Law", 29 *ibid.* 472 (1935). In his report, Mr. Anderson cites the decisions of the Supreme Court in the cases of *Holden* v. *Joy,* 17 Wall. 242, and *Geoffroy* v. *Riggs,* 133 U.S. 267. From the latter he makes the following quotation: "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States." Therefore, Mr. Anderson concludes, "The only constitutional limitations and restrictions imposed upon the exercise of this general power to make treaties are to be found in the provisions of the Constitution which expressly confide in Congress or in other branches of the Federal Government the exercise of certain of the delegated powers and establish certain rights which may not be interfered with, or impose certain obligations which must be observed by the Federal Government, and finally, which reserve to the States or to the people all powers not granted to the United States."

These views were reiterated by a later distinguished authority on constitutional and international law, a former Chief Justice of the United States, Secretary of State of the United States, and Judge of the Permanent Court of Justice at The Hague. Speaking as President of the American Society of International Law before that body on the subject of the "Limitation of the Treaty-Making Power of the United States" on April 26, 1929, Charles Evans Hughes said:

> The normal scope of the power to make a treaty can be found in the appropriate object of the power. The power is to deal with foreign nations with regard to matters of international concern. It is not a power intended to be exercised, it may be assumed, with respect to matters that have no relation to international concerns. . . . If we attempted to use the treaty-making power to deal with matters which did not pertain to our external relations, but to control matters which normally and appropriately were within the local jurisdiction of the States, then I again say there might be ground for implying a limitation upon the treaty-making power that it is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty-making power. *Proceedings of the American Society of International Law, 194-196 (1929).*

A treaty under the Constitution has been defined by the Supreme Court as "primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it." *Edye* v. *Robertson,* 112 U.S. 580 (1884). In defending the treaty-making clause before the Constitution was adopted, Alexander Hamilton wrote: "The power of making treaties . . . relates neither to the execution of the subsisting laws, nor to the enaction of new ones . . . . Its objects are", he emphasized, "contracts with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign." *The Federalist,* No. 75. Hamilton's statement that treaties have the force of law referred to the provisions of Article VI of the Constitution; but that was the first instance of any government declaring that treaties should be the supreme law of the land. *Ware* v. *Hylton,* 3 Dallas 199 (1796). With a few exceptions, no other governments have followed the example of the United States.

### Treaties Need Not Be Law of the Land

It is not a requirement of international law that treaties be the law of the land or be enforceable without action of the legislative power. International law is not concerned with the methods of enforcing treaties in the domestic domain. There is no uniform rule in all countries investing the courts with powers of treaty enforcement even following legislative action. The rule varies in different countries between judicial and executive action and combinations of both powers.

As stated above by Mr. Justice Sutherland, the position of the United States in the family of na-

tions under the law of nations is exactly the same as that of any other nation. This equality was judicially determined by a federal court nearly a century ago with respect to the enforcement of treaties. Mr. Justice Curtis in *Taylor* v. *Morton*, 2 Curtis 454 (1858); affirmed by the Supreme Court, 2 Black 481, held:

> The foreign sovereign between whom and the United States a treaty has been made has a right to expect and require its stipulations to be kept with scrupulous good faith; but through what internal arrangements this shall be done is exclusively for the consideration of the United States. Whether the treaty shall itself be the rule of action of the people as well as the government, whether the power to enforce and apply it shall reside in one department or another, neither the treaty itself nor any implication drawn from it gives him any right to inquire.

In that case the Court recognized the purely municipal character of the provision of Article VI of the Constitution making treaties the law of the land, and anticipated the effect of its possible repeal as follows: "If the people of the United States were to repeal so much of their Constitution as makes treaties their municipal law, no foreign sovereign with whom a treaty exists could justly complain, for it is not a matter with which he has any concern."

It is usual that treaties do not become internal law except by an act of internal legislation. An unimpeachable statement of the law on this subject as it exists today was made by the Judicial Committee of the Privy Council in the case of *Canada* v. *Ontario and Other Provinces*, [1937] A.C. 326, in a case involving the power of the Parliament of Canada to enact labor legislation in compliance with a treaty, a subject which the provinces asserted came within their exclusive legislative competence. In denying the power of the Dominion Parliament to enact such legislation, the Privy Council held that "There is no such thing as treaty legislation as such .... Such a result would appear to undermine the constitutional safeguards of Provincial constitutional autonomy." The Privy Council then gave the following analysis of the law on the subject:

> It will be essential to keep in mind the distinction between (1) the formation and (2) the performance of the obligations constituted by a treaty, using the word as comprising any agreement between two or more sovereign states. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the Government of the day, decide to incur the obligations of a treaty which involve alteration of law, they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases, before final ratification, seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it.

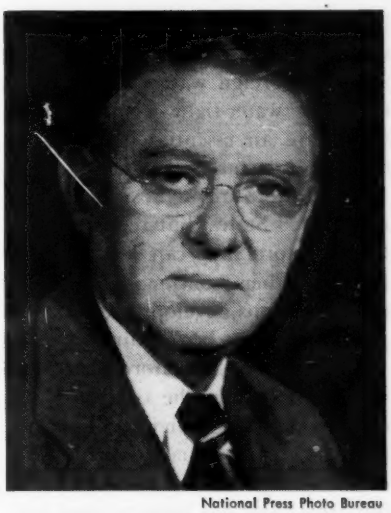
The Privy Council recognized the binding obligation of a treaty between the contracting states, but held that "The nature of the obligations does not affect the complete authority of the legislature to make them law if it so chooses."

### Privy Council Answers Argument That Treaty Supremacy Is Necessary

It is argued that the treaty supremacy clause is necessary in a federal state and that the repeal of this provision would deprive the United States of the sovereign power of enforcing some of its treaty obligations. Substantially the same argument was made before the Judicial Committee of the Privy Council in the Canadian case. It was met by the holding of the Privy Council as follows:

> In a federal state where legislative authority is limited by a constitutional document, or is divided up between different legislatures . . . the obligations imposed by the treaty may have to be performed, if at all, by several legislatures, and the executive have the task of obtaining the legislative assent not of the one parliament to whom they may be responsible but possibly of several parliaments to whom they stand in no direct relation.
>
> It must not be thought [the Privy Council continued] that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and Provincial together, she is fully equipped. But the legislative powers remain distributed. When Canada incurs treaty obligations dealing with Provincial classes of subjects, the exercise of the totality of powers requires cooperation between Dominion and the Provinces.

The observations of the Privy Council on the expanding position of Canada in the field of external affairs seem apposite to the conditions that have now made necessary a constitutional amendment to limit the treaty-making power of the United States in the interest of preserving the proper balance between federal and state powers in



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internal affairs: "While the ship of state now sails on larger ventures and into foreign waters she still retains the water-tight compartments which are an essential part of her original structure."

If treaties are self-executing in the United States, but require legislation before they can be enforced by the other contracting parties, then situations develop where treaty provisions may be binding in the United States and enforcible in its courts but not in the courts of the other contracting parties unless and until such parties enact the necessary enabling legislation. This defect in our treaty law has been pointed out by Judge Manley O. Hudson in "The Factor Case and Double Criminality in Extradition", 28 *Am. J. Intl. Law* 276. This case was reported in 290 U.S. 276. Judge Hudson suggested that "Future treaties of the United States might be drawn to avoid this situation." The constitutional amendment proposed by the American Bar Association proposes to avoid this situation by placing treaty law in the United States on the same plane of equality with treaty law in other countries, and thus restore the United States to the equality in this respect with all other members of the family of nations to which it is entitled.

### Proposed Amendment Would Not Impair Foreign Relations

It is not the purpose of the proposed amendment to curtail any of the power of the United States to perform its obligations as the sole and exclusive representative of the people of the nation in all matters appropriate to the conduct of the foreign relations of the Government. It is the purpose of the amendment to emphasize that all legislative powers granted by the people "shall be vested in a Congress of the United States". (Article I, Section 1 of the Constitution.) The proposed amendment is intended to make it impossible hereafter for any federal or state court to hold that a foreign nation can participate in legislating for the people of the United States under the treaty-making clauses of their Constitution.

It is objected to the final clause of the proposed amendment that in limiting Congress to its delegated powers in the absence of a treaty the United States will be unable to continue to make treaties on many subjects it has been empowered to make under the treaty supremacy clause of Article VI; but it cannot be demonstrated that the treaty supremacy clause was intended to supersede the supremacy of congressional legislation in matters pertaining to foreign affairs. It is well established by judicial interpretation that a law of Congress may modify or terminate a treaty as internal law. There seems to be no repugnancy in a proposal that a law of Congress shall also be required before a treaty becomes effective as internal law.

The power to regulate commerce with foreign nations vests in Congress legislative power to implement all treaties coming within the broad scope of this term. It has been interpreted by the Supreme Court to be equivalent to the phrase "intercourse for the purpose of trade". *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936). All treaties of friendship, commerce and navigation are in this category. They comprise the most numerous class of treaties negotiated by any nation. They include consular conventions whenever this field is dealt with separately from general commercial treaties. Consuls are essentially trade representatives. Any conflicts between such treaties and the local law would be a proper subject for the consideration of Congress in passing its enabling legislation. They might ultimately be resolved by the courts as has been the case heretofore. Under the proposed amendment, however, the courts would be obliged to be guided in their decisions by a thorough investigation and determination of the distribution of legislative power between the Federal Government and the states under the Constitution.

The great expansion of federal power under the commerce clause at the expense of the police powers of the states and also under the congressional power to provide for the common defense and promote the general welfare, has recently been the subject of a series of lectures at the Harvard Law School by a former distinguished Associate Justice of the Supreme Court of the United States. See *The Court and the Constitution,* by Owen J. Roberts (Harvard University Press, 1951.) The Court would seem to be required to place the same liberal interpretations upon these clauses in passing upon the constitutionality of legislation by Congress to make treaties effective as internal law as it has done in deciding the same questions involving the power of Congress to regulate commerce among the several states.

The jurisdiction of Congress to enact legislation to define and punish offenses against the law of nations in the absence of treaty obligations is specifically conferred in Article I, Section 8, of the Constitution. It would unduly prolong this article to discuss all the particular powers delegated to Congress by that section. It concludes with a general grant of power "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." This general grant now includes the treaty-making power, but under the proposed constitutional amendment that power must be excluded from our discussion.

"The National Government is invested with power over the foreign relations of the country, war, peace, and negotiations and intercourse with foreign nations, all of which are forbidden to the State Governments. It has jurisdiction of all of these general subjects of legislation and sovereignty which affect the interests of the whole people equally and alike, and which require uniformity of regulations and laws." *Chinese Exclusion Case,* 130 U.S. 581 (1889). The exclusive necessity

*(Continued on page 527)*

# The White House and the Vatican:

# The Legal Aspects

**by Eustace Cullinan** • of the California Bar (San Francisco)

■ The President's announcement that he had appointed General Mark Clark to be American Ambassador to the Vatican stirred up such a tempest of controversy, in the halls of Congress and elsewhere, that General Clark eventually refused the appointment and the President apparently chose to let the matter drop. The incident does not of course settle the issue, which will probably continue to smoulder for years to come. Mr. Cullinan examines only the legal and constitutional aspects in this article. The social, political and philosophical considerations that are enmeshed in the argument are beyond the bounds of the lawyer's field. In publishing Mr. Cullinan's article, the *Journal*, of course, is not taking a position on the subject.

■ Since President Truman's project of appointing an ambassador to the Vatican is in a state of suspended animation from which it may not recover, it seems possible that the *legal* questions implicit in the matter can now be discussed without engendering heat in either writer or readers. (Emphasis, wherever it occurs in this article, is the author's unless otherwise stated.)

There are two aspects of the proposal, one of policy and the other of legality. The policy question calls for a political decision by the executive on whose action the Senate alone has the veto power.

That policy question is whether the government of the United States, *acting solely in the interest of this nation*, should maintain a diplomatic representative at the Vatican, along with the forty-four other sovereignties which now do so, or should continue to withhold such accreditation as Russia does. Involved in the decision is the consideration of whether, as some say, the Vatican is the best of all listening posts for reliable reports on grass root conditions and opinions in every quarter of the globe; whether this nation should not keep in constant and intimate touch through diplomatic representation with what is probably the greatest force and this nation's most useful ally abroad in the ideological warfare against communism; or whether, on the other hand, domestic and fervent opposition from groups who fear the Vatican as much as they fear the Kremlin, and possibly more, would not offset any beneficial results to be gained by such accreditation. With that *policy* aspect of the case this article does not deal, except to the extent of saying, what I trust no American citizen will deny, that the *sole* test to be applied should be the true interest and benefit of the United States of America, rather than the gratification of groups of Catholics, Protestants, Jews, or nonbelievers, or the personal predilections of any politicians, prelates, priests, preachers, rabbis, or antireligionists.

### We Are All Concerned as Citizens

As *citizens* we are all concerned in the decision on the policy question, but whatever may be our individual set beliefs or emotional fixations, lawyers and judges, *as such*, are, or ought to be, concerned only with the question whether the maintenance of an embassy to the State of Vatican City is prohibited by the Constitution. If such an embassy is not contrary to the fundamental law of the land the judicial branch has no concern with it, and no right to condemn it, even though a majority of the highest Court may deem that the course proposed or taken is, as a matter of policy, contrary to tradition, and provocative to influential elements of the population. Unless that be so, the Supreme Court, having the last word, is the real policy-making branch of the Government despite the Constitution.

Though some lawyers may think that the Court has, on occasions, more or less unintentionally usurped that function, the Court still pays more than lip service to the separation of powers and will not claim, though once in a while it may exercise, the policy-making authority.

The foregoing brings us to the legal question, academic at the moment, which would be presented by confirmation of the appointment of an ambassador from the United States to the sovereign state, however small in area (109 acres), that is officially designated as the State of Vatican City in the Lateran Agreement of 1929; a treaty with the Pope in which Italy conceded the Pope's temporal sovereignty over that territory. The Lateran Agreement is now an integral part of the Constitution of Italy adopted in 1947. Over that territory the Pope is an actual sovereign having his own post office and postage, his own coinage, his own police and his own flag.

Here it is well to set forth the language contained in the only provisions of the Constitution that could be cited as applicable to the point.

(a) Article II, Section 2, says that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls . . . ."

The President's power to appoint diplomatic agents and consuls is a constitutional function not derived from Congress, and requiring only the ultimate concurrence of the Senate.

(b) The following language contained in the First Amendment, and the provision which is the most significant in this discussion, is: "Congress shall make no law respecting *an* establishment of religion, or prohibiting the free exercise thereof; or . . . ."

We need not quote from the Fourteenth Amendment, certified as part of the Constitution on July 20, 1868, because it has no bearing on the legal aspects of an appointment of an ambassador by the President, that not being an action by a *state*. Most of the cases to which reference is to be made deal with actions by one or other of the states reviewed in the light of the First Amendment which, the Court says, was extended to the states by the Fourteenth Amendment.

"Prior to the adoption of the Fourteenth Amendment the First Amendment did not apply as a restraint against the states." *Everson* v. *Board of Education*, 330 U.S. 3 at 14, 91 L. ed. 711 at 722, 67 S. Ct. 504.

### Fourteenth Amendment Makes First Applicable to States

The Supreme Court has held, or assumed, in divers cases that the Fourteenth Amendment makes the First Amendment applicable to the states (*Murdock* v. *Pennsylvania*, 319 U.S. 105, 87 L. ed. 1292, 63 S. Ct. 870 (1943) ), but there is still confusion and uncertainty about the extent and effect of such application in a variety of particular instances. We are not here concerned about such application or reconciling the decisions. It must be manifest, however, that the Fourteenth Amendment *did not enlarge or in any way modify the First Amendment*. It did not give a new or wider meaning to the statement in the First Amendment that Congress shall make no law respecting *an* establishment of religion, or prohibiting the free exercise thereof. At most it imposed on the states or the state legislatures the same prohibition which the First Amendment imposed on Congress.

Unless we can find in some of the language of the Constitution quoted above, or judicial exegesis thereof, a prohibition against the appointment of an ambassador to the Vatican such a prohibition cannot be found at all. Certainly no such prohibition is *expressed* in the very simple and very clear text of the First Amendment which was written by James Madison: a statesman who has never been surpassed in this country, not even by Justices of the Supreme Court, in respect of ability to think clearly and express himself simply and definitely. To any unbiased reader familiar with the history of the colonies prior to the adoption of the Constitution there can be no doubt that the First Amendment is a prohibition on the power of *Congress* (not of the executive, not of the states) to make any *law* (not any appointment) respecting *an* establishment of religion, that is, the setting up of an established church or official religion, supported by the government. That is what the amendment says, and that is what Madison had in mind and all that he had in mind. If he had had anything else in mind it would not matter here because we must take the Constitution as written and adopted, not as some one or other of the founding fathers at some time or other may have intended or preferred it to be. In fact the First Amendment, as adopted, is different in text from the form in which Madison proposed it. (See Note 27 to Justice Rutledge's dissenting opinion in the *Everson* case.) It was modified "in the process of debate".

### First Amendment Was Not a Declaration Against Religion

Moreover it was not a declaration *against* religion or the recognition of religion by the government. It was, on the contrary, designed to secure the equality of the various religions before the law, and to prevent the setting up by the Federal Government of an established religion such as many of the states then maintained.

It was the rule rather than the exception in the colonies prior to the Revolution, as it was in nearly all European countries, to recognize an official state church supported out of taxes. In none of the colonies, by the way, not even Maryland, was the Catholic Church the established religion.

John Fiske describes the Massachusetts theocracy and its overthrow in his *New France and New England* beginning at page 197. The rights to vote and hold office were restricted to members of the Congregational Church in full communion. One effect of this policy was to drive away from Massachusetts the men who founded Connecticut and there set up a theocracy of their own. After such depletions, Fiske tells us, there was a considerable number left in

Massachusetts who were disfranchised and who would have been glad in many respects to secularize the government. By the time of the death of Charles II it was reckoned that four-fifths of the adult males in Massachusetts were disfranchised because of inability to partake in the Lord's Supper.

Fiske, in his essay on James Madison, says that Madison's activity as a member of the Virginia legislature in 1784 against the attempt to lay a tax upon all the people "for the support of teachers of the Christian religion" was based on the likelihood that it would erect a state church and curtail men's freedom of belief and worship. That is the burden of Madison's famous *Memorial and Remonstrance.* It resulted in the defeat of the tax bill and the enactment of a Virginia law "that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities".

Nearly all the states still imposed religious tests upon civil office holders, from simply declaring a general belief in the infallibleness of the Bible to accepting the doctrine of the Trinity. (Fiske's *Essay on Madison.*)

James Bryce in *The American Commonwealth* (1901 ed.) says (Volume II, page 696):

> In earlier days the States were very far from being neutral. Those of New England, except Rhode Island, began with a sort of Puritan theocracy, and excluded from some civil rights persons who stood outside the religious community. Congregationalism was the ruling faith, and Roman Catholics, Quakers, and Baptists were treated with great severity. The early constistitutions of several States recognized what was virtually a State church . . . . In Massachusetts a tax for the support of the Congregationalist churches was imposed on all citizens not belonging to some other incorporated religious body until 1811, and religious equality was first fully recognized by a constitutional amendment of 1833. In Virginia, North and South Carolina, and Maryland Protestant Episcopacy was the established form of religion till the Revolution . . . .

In Volume I at page 439, Bryce says:

> Not till 1889, however, did New Hampshire strike out of her constitution of 1792 a provision enabling the legislature to authorize towns to provide for the support of "public *Protestant* teachers of piety, religion, and morality".

The First Amendment was not intended or construed in practice to prohibit *recognition* of religions or churches by the Federal Government or to set up "a wall of separation between church and state".

Each house of Congress has a chaplain who opens each day's proceedings with prayer. Many state legislatures do the same. There are chaplains of various religions and sects in the Armed Forces.

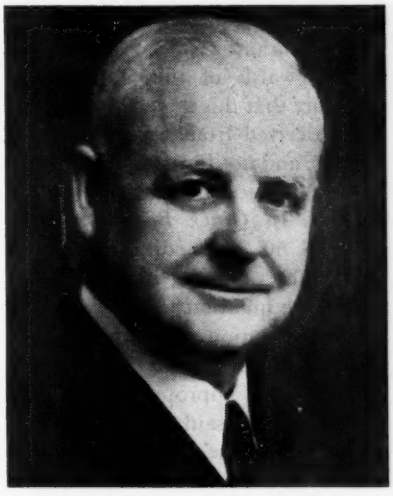
At both West Point and Annapolis, schools wholly supported and controlled by the Federal Government, attendance at church services on Sunday is compulsory, by regulation, and chaplains are attached to each school. In the Military Academy the cadet must attend Protestant, Catholic or Jewish services. In the Naval Academy the midshipman must attend services on Sundays either at the Academy Chapel or "at one of the regularly established churches in the City of Annapolis". On days other than Sunday, morning prayers are required.

Under federal statutes eligible veterans are receiving training at government expense for the ministry in denominational schools. (58 Stat. 284-289, c. 268).

### Ambassador to Vatican Would Not Aid the Pope Financially

The Supreme Court, as Justice Reed said in his dissenting opinion in the *McCollum* case, in several cases has distinguished between legislation or practices that aid religious bodies or schools and those that aid children rather than churches or schools. The *Everson* case to be discussed hereinafter sanctioned the transportation of children to church schools by the state on the ground that it was a safety measure. Certainly the dispatch of an ambassador to serve *this* country at the Vatican would not aid the Papacy financially or otherwise. It might be a safety measure.

In *Cochran* v. *Louisiana State Board of Education,* 281 U.S. 370, 74 L. ed. 913, 50 S. Ct. 335, as Justice Reed points out, a free textbook statute of Louisiana was upheld on the ground that the books were for the education of the children, not to aid religious schools. So the National School Lunch Act (42 USCA 1753, 1760) aids all children attending tax-exempt schools. Justice Reed cites also *Bradfield* v. *Roberts,* 175 U.S. 291, 44 L. ed. 168, 20 S. Ct. 121, in which the Court held proper and not in aid of an establishment of religion the payment of money by the Federal Government to build an addition to a hospital, chartered by an order of Roman Catholic nuns, and operated under the auspices of the Roman Catholic Church.



**Eustace Cullinan, Sr.,** was born in San Francisco in 1876 and has been practicing law in his native city since 1898. A graduate of Notre Dame and the University of California Law School, he has served as chairman of the California Bar Examining Committee and for some years was the chief editorial writer for the *San Francisco Bulletin.*

For years Congress has aided by appropriations sectarian schools for Indian wards of the Government. The fact that this money was in later years derived from so-called "treaty funds", and not from taxation, seems to be a distinction without much difference. In *Quick Bear* v. *Leupp*, 210 U.S. 50, 52 L. ed. 954, 28 S. Ct. 690 (1908) where the distinction was made, the question was not whether the Constitution, but whether the Act of Congress of June 7, 1897, prohibited such appropriations. Chief Justice Fuller said of the contract under which the appropriation was made: "It is not contended that it is unconstitutional and it could not be."

The draft law of 1917 was upheld against the objection, among others, that by exempting ministers of religion and theological students under certain conditions it is repugnant to the First Amendment as establishing or interfering with religion. *Arver* v. *U. S.* (Selective Draft Cases), 245 U.S. 366, 62 L. ed. 349 38 S. Ct. 159 (1918). *Jones* v. *Perkins*, 245 U.S. 390, 62 L. ed. 358, 38 S. Ct. 166 (1918).

At this point, if not earlier, the reader may begin to wonder what is the need of this long preliminary, spiced with illustrative instances, to demonstrate what appears at first sight, that the First Amendment, simple and clear as it is, means precisely what it says and says only what it means, and does not create a "wall of separation between church and state". Justice Frankfurter in his concurring opinion in *Graves* v. *New York*, 306 U.S. 466 at 491-492, 83 L. ed. 927 at 939, 59 S. Ct. 595 (a case not involving the First Amendment) said:

> Judicial exegesis is unavoidable with reference to an organic act like our Constitution, drawn in many particulars with purposed vagueness so as to leave room for the unfolding future. ***But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.***

There is no "purposed vagueness" in the First Amendment.

Unfortunately, Justice Frankfurter, in writing about the First Amendment, has leaned much more on exegesis than on the ultimate touchstone. He and his colleagues in what, in his touchstone mood, he might have called a thaumaturgic exegesis have put the text of the First Amendment through such a metamorphosis that James Madison would not recognize his brain child under the thick judicial gloss. The result is that those who oppose the appointment of an ambassador to the Vatican on legal grounds seem to be relying on the gloss rather than the ultimate touchstone, which is the text. But even the gloss fails to support them.

The general board of the National Council of the Churches of Christ in the United States, for one example, adopted a statement, October 31, 1951 (eleven days after the nomination of General Clark), protesting the appointment "as a threat to basic American principles". The American Jewish Congress for another example, on November 19, 1951, adopted a resolution calling for separation of church and state and opposing appointment of an ambassador to the Vatican.

What "basic American principles" would the appointment threaten? How is "separation of church and state" involved in the appointment? Surely the authors of these resolutions must have had in mind some interpretation of the First Amendment not supported by the text; some "basic American principles" distilled from the text by judicial scholiasts; some definition of the separation of church and state different from the simple sentence: "Congress shall make no law respecting *an* establishment of religion, or prohibiting the free exercise thereof."

If they cannot find such support in the opinions of the Supreme Court, or of the several concurring and dissenting Justices in two fairly recent cases, they cannot find it elsewhere. Those two cases are *Everson* v. *Board of Education* 330 U.S. 3, 91 L. ed. 717, 67 S. Ct. 504 (1946), and *People of Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 92 L. ed. 649, 71 S. Ct. 324 (1948). They stretch the First Amendment more than any preceding or subsequent cases. Hence there is no need in this article of going behind them for other instances. And in reviewing those cases we are interested not in the results but in the language of the various opinions as such language might be brought to bear on the legality of an embassy to the Vatican.

First let us look at the *Everson* case.

A New Jersey statute authorized local school districts to pay for the transportation of children to and from schools. The transportation service was extended to children attending Catholic parochial schools. This expenditure of public money was challenged. The Supreme Court held, as the New Jersey court had held, that this expenditure of money served a public purpose and that it did not violate the First Amendment's prohibition against an establishment of religion by law. The Court alluded to the history of religious persecutions in Europe and in the American Colonies. In a footnote (7) the Court remarked: "Almost every colony exacted some kind of tax for church support." In its opinion the Court said it was the feeling of indignation against these practices which found expression in the First Amendment, quoting language of Jefferson and Madison who led the fight against the tax in Virginia for support of the state's established church and defeated it. The Court in its opinion in the *Everson* case and disregarding the language of the First Amendment, said that the provisions of the First Amendment had the *same objective* and were *intended* to provide the same protection against government intrusion on religious liberty as the famous "Virginia Bill for Religious Liberty", originally written by Thomas Jefferson, which provided that "no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever". *(Continued on page 530)*

# The Joker in the Constitution:

# A Basis for the Welfare State

**by Thomas F. Walker** • of the Virginia Bar (Wytheville)

■ Mr. Walker's thesis is that the President and Congress, following hints contained in Supreme Court dicta, have managed in the last twenty years to find a weakness in the text of the Constitution that has enabled them to nullify the basic constitutional concept of division of power between the Federal Government and the states. In provocative language, he traces the steps by which, he says, the Roosevelt and Truman Administrations seized upon judicial hints to reverse the Supreme Court's early holdings that the New Deal program ran afoul of the Constitution. He offers a program for the revival of what he considers to be a lost constitutional safeguard.

■ "The Constitution is dead", cried McReynolds.

When the Justice made that statement in the *Gold Cases,* he might as well have said, "The states have lost their sovereignty." A new America had been born: the mother of federalism, statism, collectivism, socialism, (communism?) or a welfare state. No matter what one calls it, the end is the same. Although a strange new interpretation of an old familiar charter had cost the states their sovereignty and the old Constitution her virtue, it was not without some *verbal* authority in her bosom.

This is a short story about the new "conception" of the old document in her ripe old age. A new meaning to an old writing. A new nation from an old Union. An unknown future from a revered past.

From 1930 to 1940 the American people were looking to Washington for help. They were more interested in its stabilizing help than preserving the balance of power between the states and the nation. The depression had put them in need of faith and food.

The states and the people themselves in their distress seemed unable to cope with the situation. They lacked the will and patience to stand and wait on the inertia of established practices and principles. The new Administration in 1933 did not want to wait for our economy to recuperate naturally. It was eager for action. So necessity invented expediency as fast as possible; but there were many obstacles.

The Constitution stood in the way of quick relief by the Federal Government. A plausible excuse had to be found *within* the Constitution to satisfy the ordained interpreters of it. Without war no excuse outside the Constitution was acceptable to the Supreme Court, which had regarded itself as an umpire in the duel between the states and the Federal Government.

And so it came to pass the immortal document had to be reconstrued if a dominant power was to be established at the national capital and the Republic—a commonwealth of sovereign states—converted into a welfare state of exclusive sovereignty.

The accomplishment of this renaissance is the story here.

Some one had to discover a joker in the Constitution. Have the states lost their sovereignty in the new discovery?

### First Joker Fails

The first joker the New Deal produced was the Preamble to the Constitution and the flirtatious phrase *general welfare.* This centuries old abstraction, in the original Articles of Confederation, was carried into the Constitution: "We, the people of the United States, in order to . . . promote the general welfare . . . do ordain and establish this Constitution for the United States of America."

The NRA sought to use it: "to provide for the general welfare by promoting the organization of industry". It related to local industries of all sorts. It was to be enforced by penal statutes. It gave legislative powers to the Chief Executive and his agents to regulate local business in all the states.

The nine old men were misjudged. Hadn't they said in *Jacobson's Case,* 197 U.S. 11, that the Preamble in-

dicated the general purpose of the Constitution, but that it never had been regarded as the source of any substantive power? "Such powers embrace only those expressly conferred to it in the body of the Constitution and such as may be inferred from those granted."

So they had to say again in the NRA opinion: "These powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they think that more or different power is needed."

The NRA invoked no element of any congressional power derived from an express or implied grant. It was a fireside invasion of state sovereignty. Congress had no power to regulate wages and hours in local business. That was reserved to the states. Besides, the act vested in the President and his subordinates lawmaking authority.

Thus the first joker failed.

### Tax Clause Provides Second Joker

Congress and the Executive Department then realized that they had to find their jokers within the granted powers. Not in the Preamble. In the unfathomed caves of the tax clause they discovered this precious jewel.

"Congress shall have power to lay and collect *taxes,* duties, imposts, and excises, *to pay* the debts and *provide for the* common defense and *general welfare* of the United States."

About as harmless looking as the Preamble, perhaps; but what a national gem! The United States had no inherent sovereignty. None was to the nation born. It was confined to those powers *granted to it within the Constitution by the several states.* All other sovereignty belonged and still belongs to the states.

There is the hourglass of relative powers. The more the one, the less the other. A tug of war. The Constitution, Article I, Section 8, fixes the scope of authority the states gave to the Union. They kept the balance for themselves. The Tenth Amendment: "The Powers not delegated to the United States, by the Constitution, are reserved to the States, respectively, or to the people."

Passing unconstitutional laws may be expected of legislative bodies. But congressional acts must also pass the Supreme Court if challenged. Article 3, Section 2, authorizes the Court to review such acts. They are unconstitutional if the Supreme Court says they are. The voice of the Court is the law of the land.

The states surrendered—deeded as it were—to Congress the power to tax the people for certain purposes, to control finances and currency and interstate commerce, the mail and patents, and to maintain armies and a navy and declare war, and, if necessary, call out the militia, and to control the seat of government—the District of Columbia.

The sort of central government contemplated by the states is apparent from the nature of the enumerated powers. But the framers added a corollary power, called the *sweeping power,* to enable Congress to pass all other laws *necessary and proper* for carrying those specifically granted into effect. This was no additional or different power. Only those specifically granted could, under this auxiliary authority, be put into effect or exercised by the national Government.

Is it not pretty bewildering, then, to contemplate the expanse of power claimed by the national Government under the tax clause to provide for the general welfare of the nation and the people? It was in bewilderment that the New Deal sought the real joker *within the granted powers.* A new Constitution came, Phoenix-like, out of the old and left the sovereignty of the states like a dried cocoon.

When the AAA was attacked the Supreme Court could not dismiss it as a childish attempt to invoke the Preamble as a source of power or as an obvious delegation of legislative power to the Chief Executive. It was compelled to construe the tax clause (not merely define the word *tax*) after evading the issue for 150 years.

The Government argued with much force but less conviction that "Congress has the broad and ample power to lay and collect taxes *and* provide for the general welfare." This time it was relying on a granted power. "There is neither time nor need to amend; the tax clause provides the specific power we must have."

By a system of bonuses and fines, the AAA was foisted on the people by the Federal Government's executive and legislative agents. Six to three, the Court foisted it off again as unconstitutional.

In short, the Department of Agriculture was empowered to hire farmers to reduce crops and livestock and to fine them for refusal to do so. It was doing this thing with taxes collected from the public. It was an effort to *control* agriculture. But where in the immortal document—the deed from the states—was there even a mention of *agriculture?* Undoubtedly agriculture had been reserved by the states to themselves.

### Second Agriculture Act Challenges the Court

The Federal Government lost the trick; but it learned to play the joker it had found. It refused to quit and proceeded to pass the second agriculture act: a challenge to the Court and the states. Congress took the hint contained in Justice Roberts' decision and in Justice Stone's dissent to the effect that it could tax and spend for the general welfare if it refrained from forceful regulation. Hadn't Roberts said, "If the expenditure is for a national public purpose, that purpose would not be thwarted because the payment is *on condition*"? Thus a soil conservation or crop control act with more inducement and less punishment was passed. This was so despite the fact that agriculture had been reserved to the states. This was more than regulation. This was control of the purse strings. And the Tenth Amendment virtually gave up the ghost. What remained peculiar to the states? What now was forbidden ground? That is the great

question here.

Whether the Court erred or not depends entirely on the interpretation of the tax clause. What does it really mean? What does it honestly delegate to the Federal Government? These questions arise:

1. Can the Federal Government by *general laws* provide for the general welfare? No! The answer, not too firm and generally ignored, is in the *Butler* case.

2. Can the Federal Government provide for the general welfare by the expenditure of revenue? Yes. But by the expenditure of revenue only. Not by general laws. The expenditure also must be for the support of the government, within the scope of the Constitution, or for a national public purpose. These three phrases mean the same thing. But they can mean anything from nothing to the ultimate thule. The word *tax* is no longer a mere exaction for the support of the government; because the support of the government is no longer the scope of the *old* Constitution, but is the scope of the *new* Constitution. And now both the word *tax* and the three phrases are as broad as the general welfare of the United States. Their old meanings have been swallowed up in the new interpretation. Revenue may now be collected and spent at congressional will on all matters not reserved to the states.

3. Can the Federal Government provide for the general welfare by supporting *agriculture* with federal revenue? Agriculture is reserved to the states? The amazing answer is both yes and no. Under the *Butler* decision it is both reserved to the states for regulation and committed to federal care for assistance. The reservation becomes a federal hunting ground. Reserved to the states, it is within the reach of federal help. We see at last that it was a *power*—and not a *thing*—that was reserved to the states by the Tenth Amendment. This is deduced from the decisions of the High Court.

If this distinction is sound, education, manufacture, mining, retailing and even the professions are within the grasp of the Federal Government. These *things,* they say, were not reserved. Only the *powers* to regulate them!

4. Can the Federal Government regulate or only assist these fields reserved to the states for control and granted to the United States by the same immortal document for assistance? It can't regulate them under the title "regulation", but it can regulate them under the title "assistance". The purse is more powerful than punishment. The power to regulate was reserved to the states, but the subject matter is common ground, according to the Court.

5. What then is the scope of federal authority? The answer is, the extent of federal exercise of power. Seen in the opposite direction, is it unconditional surrender by the states?

The tax clause filled the bosom of the people with terror when first proposed. Pinckney, of South Carolina, proposed: "Congress shall have power to lay and collect taxes, duties, imposts, and excises." Unlimited, it was dreaded and defeated.

As first drawn the tax clause read: "The Federal legislature shall have power to create a treasury; they shall have power to lay and collect taxes, duties, imposts and excises; to pay the debts and provide for the common defense and general welfare of the United States."

### Tax Clause Is Capable of Many Constructions

This draft may have given the Congress a broad and ample power to provide generally—not merely by taxation—for the general welfare. Not likely, however, as it was tied and subordinate to the tax power. But as punctuated, it was or seemed to be a general and unrestrained power to provide for the general welfare. If so, all other clauses were useless. This draft was altered in both language and punctuation. But it remained, as finally worded, subject to many constructions.

### Three Power View

Congress shall have power (1) to lay and collect taxes, (2) to pay the debts, and (3) provide for the common defense and general welfare of the United States. The possibility of this construction was known and debated in colonial days, especially by Patrick Henry, who, for that and other reasons, opposed its ratification. President Roosevelt endorsed this interpretation in his speech at Charlotte, North Carolina, about fourteen or fifteen years ago. He asserted, "Congress has the ample broad powers to lay and collect taxes *and* provide for the general welfare." Congress has the power to lay and collect taxes *to* provide for the general welfare. No court ever gave serious consideration to this three-power view. Sentence structure practically forbids; although it is possible.

*"And"* for *"to"* is the difference between a parliament and a republic or a benevolent government.

### Two Power View

Congress shall have power (1) to lay and collect taxes to pay debts; (2) provide for the common defense and general welfare of the United

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States. This construction is little different from the Three Power View. And subject to the same structural vice.

The framers of the Constitution would not have hidden a charter of unlimited sovereignty in the middle of the tax clause, behind the simple power to lay and collect taxes to pay debts, and gone on in the very same clause to enumerate definite and specific inferior powers in the same article. Surely a charter of complete sovereignty was entitled to the dignity of a separate paragraph. Particularly so when it would have made all the other powers mere surplusage. Such power would make a parliament of Congress, strip the states of their sovereignty, the people of their inalienable rights, leave nothing reserved to the states, and dry them completely up.

### One Power View

Congress shall have power to lay and collect taxes to pay the debts and provide for the common defense and general welfare of the United States. The semicolon after the word taxes disappeared in the accepted draft. In some texts there is not even a comma after taxes. Other texts retain the comma. But the Court has held repeatedly that this is a *tax* clause, a revenue act; and that the power to pay the debts and provide for the common defense and general welfare depends entirely on the tax power. In other words Congress has the power to lay and collect taxes for the purposes set out in the infinitive phrase following the power to lay and collect taxes. And taxes are revenue only. And for the support of the government only.

This is a mere tax power to enable the Union, a mere creature of the states, to levy and collect its own revenue, instead of calling on the states for contributions. But Congress can exercise this power for three purposes only; namely, the debts, the common defense and the general welfare of the United States. So we have, instead of an *ample broad power to provide for the general welfare,* merely the right to tax to provide for the general welfare, a limited tax power. And that within the scope of the Constitution and the true meaning of the word "tax".

### Framers Limited Federal Tax Power

It was a jealous fear that caused the framers of the Constitution to limit the tax power. But they used the most unfortunate language possible. These abstractions, which they deemed limitations, have turned out to be flexibilities, which searching and grasping intellects can expand into boundless authority. This would not be so, had the framers added to the clause "as confined to the other, enumerated powers", or "as confined to the scope of the Constitution", or even the one word "government"; or somehow made it clear whether their words referred to the thirteen states, jointly and severally, knitted together loosely for common defense and general welfare into a union, or to the United States as one state, one nation, one sovereign, one empire, by the new name United States. But, since the framers did not do so, they left the tax clause, if the document is detached from the history of it, subject to at least five other minor logical interpretations.

### Restrictive View of General Welfare

Madison and others contended that the phrase *general welfare* was a reference only to the other powers delegated in Article 1, Section 8. They were the scope of the Constitution. Debts, defense and welfare were a brief abstraction to cover the limited sovereignty of the Federal Government without detailed repetition. The tax clause was a mere purse to finance and enforce the other seventeen powers. These three abstractions were added to the tax power, not to enlarge it, but to confine it to the other definite powers. This was a tight construction. It was doubtless originally so intended.

### The Most Radical View

The advocates of this view contend that the tax clause confers upon Congress the absolute right to levy and collect taxes to make any provision it sees fit, for the general welfare of the United States. General welfare speaks for itself, names its own ends, is its own excuse for being, and is not a reference to other congressional powers or the other parts of the Constitution at all. This power is not confined to any scope. It speaks for itself and means what it says. Debts, common defense and general welfare are themselves a large part of the scope of this power.

This concentrates in Congress full and unreserved authority to exercise the taxing power—the first of seventeen definite powers—in relation to any subject matter in existence, agriculture, business, industry, finance, manufacture, education, domestic affairs and every other imaginable local matter, so long as Congress is of the opinion it is exerting the power to provide for the general welfare.

It is not only the power to spend in aid of them, but permits, *by means of taxation,* their absolute regulation by the Federal Government. Of this the first AAA was an example. It was logically contended that calling the words *general welfare* a reference to the other powers or, scope of the Constitution, reduced them to mere tautology in violation of the established rules of construction. Thus the Federal Government had the right to control and regulate agriculture (and if agriculture, education, domestic relations, intrastate commerce, etc.) by means of taxation. Is not the tax clause express authority in the Constitution for doing so?

This may seem absurd in the light of history. But it is logical and it is in the Constitution. The Court repudiated it in the AAA opinion six to three. But Justice Roberts in his opinion and Justice Stone in his dissenting opinion pointed the way to a compromise. This compromise is a more indirect regulation. You can catch more flies with honey

*(Continued on page 532)*

# On the Selection and Keeping of Apples: Some Observations on the Tax Scandals

by **Edgar J. Goodrich** • of the District of Columbia Bar

■ Recent revelations of corruption in the highest echelons of the heretofore unimpeachable Bureau of Internal Revenue and Tax Division of the Department of Justice roused the nation. Connivance and bribery in the federal tax bureaus have undermined citizens' confidence in government and possibly have even endangered the tax structure itself. In this article, Mr. Goodrich discusses a third result, the lowering of the morale and efficiency of the vast majority of honest, faithful government workers charged with the duty of assessing and collecting our federal taxes. Mr. Goodrich holds that this may be more disastrous than any effect the news of corruption may have upon the citizenry as a whole.

■ When I was a boy, Dad used to put down a barrel of apples each fall. They were carefully selected, carefully packed. At regular intervals, Mother, with the help of any of us children she could catch, would inspect all the apples and remove any which seemed to be getting spotty. Sometimes a hidden worm caused the trouble; sometimes a bruise; sometimes soft weather. But there were very few bad apples, and once removed, they couldn't hurt the others. Consequently, every year we had nearly a full barrel of tough-cored, firm-fleshed fruit which gave a very satisfactory performance in pie and sauce and were good munchers with the Sunday night popcorn before the fireplace.

Men and women react a lot like apples and need much the same kind of care and attention, whether employed in private professional or commercial enterprise or government service. The vast majority of them are good apples—that's beyond disputing with one who has had contacts with thousands of them over the years. But the good apples in the government service are being badly bruised just now through the spectacular and much-publicized removal of some spotty ones. Or, to change the metaphor, the same broad brush with which the press is slapping the suspected offenders is tarring also the thousands of decent, devoted, public servants in the rank and file who are doing their jobs capably and honestly. That hurts them immeasurably and that hurts immeasurably you and me, and every private citizen because it breaks down the administration of government.

Let's look at the situation at press-time.

### Tax Division and Bureau Are Target Centers

So far, the Tax Division of the Department of Justice and the Bureau of Internal Revenue have been high-lighted in the reports of investigations, chiefly those of the King Committee. The street rumors say the unsavory revelations have just begun, not only as to those two organizations, but as to many other administrative bodies and wartime agencies. That may be so, but let's wait for the evidence.

The public has been bombarded with cries of corruption, collusion and cynicism amongst officials, of the bribe and the fix in high places. So far the evidence has disclosed colorful stories of free airplane trips, discounted purchases, free hotel accommodations, "side-businesses" carried on by a few key men, and their companionship with influence-peddlers and other artists of the "fast buck". Those things are wrong of course: they shouldn't have been done. But, except in a couple of cases, there has been no showing as yet that there has been "money" dishonesty. The petty graft so far disclosed is not sufficient to justify impressing upon the public that the Department of Justice is no longer enforcing the laws and that the Bureau of Internal Revenue is "scandal-ridden". It does justify deep contempt for the stupidity of the few who, for some tawdry trifles, have brought disgrace upon themselves and, far, far worse, upon thousands of loyal, honest workers.

If there is a mess, it should be cleaned up, of course. If evil has been done, the offenders should be

punished as severely as possible for betrayal of a public trust. Every honest person wants that.

And no one desires that more fervently than the career people in the organizations under fire—the second, third and fourth chair boys who do the work, who tote the load, year in and year out—and for hundreds of them that load demands much night and week-end work without additional compensation. They are the fellows who keep the wheels turning, the grist grinding; they carry on the business of the Government and nothing is more bitter to them than to witness, or suspect, the improper by-passing, overruling, or pigeon-holing of their honestly conceived recommendations for the disposition of their cases, whether for settlement or trial. There's been evidence of that and it's a serious charge; and I venture that anyone proved guilty of such actions will be despised by the rank and file with a deep and abiding hatred. It is most unfortunate that this attitude of the great majority of these employees has not been brought widely and convincingly to public attention.

It's most unfortunate, too, that the publicity attendant upon the proceedings of the King Committee—the vital importance of whose work I have no desire to discount—was not handled with better judgment and discretion. Some people were disgraced and the finger of scorn was pointed at two important and hard-working administrative bodies because of the publicity given to unproved accusations coming from questionable sources. That's bad, but even worse is the fact that the entire system of federal tax administration has been endangered. That danger arises, first, from a sharp and increasing loss of faith by the general public in the basic soundness of the federal tax system and the honesty of the people who administer it; and second, from a sharp and increasing loss of morale amongst the thousands of employees of the Bureau of Internal Revenue throughout the country and those in the Tax Division of the Department of Justice.

### Tax Administration Is Slowing Down

That those results have occurred cannot be denied. Public faith and individual courage can be restored, of course, and will be, in part at least, by organizational and procedural reforms currently being considered. But that takes time and effort. Meantime, the feeling is growing that tax administration is slowing down, if not breaking down, that government people, from revenue agents in the field to conferees and attorneys on the higher levels in the Bureau and Division have become reluctant to settle tax controversies for fear of possible future censure for not having insisted upon the maximum amount of tax which theoretically could be asserted in any given case. As a result, matters that formerly would have been compromised on their merits, on a basis satisfactory both to the Government and the taxpayer, are now being "passed along" to higher levels; and unhappily, there too the tendency is increasing to refuse to assume appropriate responsibilities and instead to pass the cases along to the courts. If those tendencies continue and increase, the result is inevitable—a welter of litigation which will swamp the courts and immeasurably delay determination of the rights of the Government and its taxpayers and the collection of the revenue.

Let me give you some examples of what I'm talking about: forgive the personal references, but these are experiences I've had since the "tax scandals" broke:

A revenue agent came to our office to check the return of a taxpayer whose records we keep. I gave him the records and a place to work and from time to time answered questions which arose. He worked quickly and well, and completed his examination, making some minor adjustments. As he prepared to leave he said: "I want to thank you for being courteous to me." I asked, "Why shouldn't I be courteous to you?" He replied, "Well, maybe you should, but a lot of people aren't any more."

I sat him down and got his story. It was one of complete discouragement. People actually were rude to him, he told me; they sneered at him as one of "that gang of crooks in the Revenue". He's looking for another job.

Again: after several months of work and discussions I left a conference with appropriate Bureau people with the tacit understanding that we had arrived at a basis of settlement for a case pending trial before the Tax Court. I promptly wrote out the settlement offer and sent it in. I've since received word there will be no settlement.

Another: I've recently been in the trial of a tax case in a District Court. Along in the second day when the case was shaping up I said to my opponent during recess, "I think you've chosen a bad case to try." He replied, "The odds may be in your favor, but what can I do?" I said, "Well, maybe our settlement offer is still open." He grinned and shook his head. "You know I can't settle a case these days", he said.

Lastly: I recently had a conversation with an old friend in the Bureau who has long held an important post there, staying on past retirement time as he was requested to do because he was needed. He told me, "I don't have to stay here and take this stuff; I'm getting out." He has, and the service has lost a good man.

### What Caused the Situation?

What gives rise to this situation in which charges of graft are flung indiscriminately and wholesale, in which it is declared, without citation of chapter and verse, "that the Government's tax collection agencies are honeycombed with corrupt officials"?

Nobody knows the whole answer of course, but I offer these observations, all of which have been labored in the public prints.

(1) *We've had a spell of soft weather.*

We're living in a most difficult and trying time, and some of the moral fibers have worn out or decayed. The ancient standards of ethics and conduct have been whittled at or by-passed. Individual dishonesty has become less rare, with a resultant increase in institutional and organizational dishonesty. "We need to return to the old Gods."

(2) *The best apples have not always been chosen;* some recent selections have not had the core required to last through the winter.

A recent editorial summed up that charge about like this: "Key positions have been filled with second-rate men who, naturally chose as their assistants third-rate men; hence the mediocrity of governmental administration."

(3) *The apples haven't been examined frequently enough.*

I blame this in part upon the decentralization process which began in 1938. Before that time tax administration was carried on by a closely knit organization with established checks, double-checks and balances. The system made it easy for the honest to stay honest, and difficult for those inclined otherwise to indulge. There is much merit to a paraphrase of the old prayer—"Leave us not in temptation."

During the discussions preceding the decentralization movement many well-advised people regretted the policy and said so. They feared it would weaken the controls which fixed responsibility in the processing of tax controversies and collections. They feared particularly the extension of power and administrative responsibilities to collectors who, notoriously, have always been appointed for their political usefulness and not for their knowledge of taxation or their standards of ethics. While, in name, the collectors have been a part of the Bureau, they have never been on the first team, nor given the training, discipline and supervision which the varsity gets. They've always let holes in the line.

(4) *There's a big crop of worms.*

There has been a steady increase in rumors of the possibilities for "fixing" tax troubles, either at the lowest or the highest levels. As in adultery, it takes two to make a fix, and the worms are the dishonest practitioners who get into the apples. That they will be caught up and punished no one desires more fervently than the ethical practitioners who present their cases on their merits, putting their cards on top of the table, but who have to compete with the jacklegs.

### What's To Be Done About the Matter?

If the grave injustice to thousands of devoted employees who are rendering competent service to their Government and its taxpayers is to be alleviated and if the dangers flowing from that injustice are to be abated, certain fundamentals must be remembered by the King Committee and learned by the public.

In the first place, it must be realized that few problems arising under the Internal Revenue Code can be answered categorically and without question, one way or the other.

Secondly, that the compromise of such disputes is an established, integral and indispensable part of our system of tax administration.

Thirdly, that without the instrument of a settlement procedure the expense of administration to the Government would be prohibitive, because the Bureau, the Department of Justice, and the federal judicial system would not be able to handle the tremendous amount of litigation which would inevitably follow.

Also it should be made abundantly clear that the extensive procedures of review in both the Bureau and the Department, affording ample opportunity for taxpayers and their representatives to argue and reargue the merits of their cases, are designed to insure the soundness—from both points of view—of the recommendations made by the examining officer in his initial report.

But this system of compromise and review requires a clear understanding of their respective functions not only by taxpayers and their representatives, but also by the Government's representatives. If the latter are to do their job well—if they are to perform their primary function of determining, in the exercise of their honest judgment, the correct amount of tax due (which is something quite different from collecting the maximum amount of tax theoretically assertable)—if they are to serve their Government and the taxpaying American public well, they must be free from apprehension of a possible future examination of their work based on something other than a detailed knowledge of the specific tax considerations involved. They cannot adequately and effectively exercise their discretion in negotiations looking toward the possible resolution of tax cases without trial, if they have to be concerned with how the written record might look, some years later, to a congressional or other investigator uninformed as to the facts. Their sole concern must be, as it always has been—the exercise of their honest judgment. Mistakes? Certainly; only dead men make no mistakes.

**Edgar J. Goodrich** has practised in Washington since 1935. He is active in the work of his local bar association and in the Section of Taxation of the American Bar Association, and lectures frequently before bar association groups on various aspects of taxation and practice.

But no one should be damned for exercising honest judgment.

Unhappily, the publicity attendant upon the King Committee's activities is tending to give the words "compromise" and "settlement" a stigma of impropriety or even illegality. For example, the impression is being created that it is wrong, and conduct unbefitting a lawyer, for a representative of a taxpayer against whom criminal prosecution was under consideration, to confer with appropriate officials of the Bureau or the Department of Justice for the purpose of convincing those government representatives that the merits of the case did not warrant such action. Surely the mere fact that criminal prosecution—or any other action—has been recommended by one or more persons in the chain of tax administration does not *ipso facto* mean that such action is correct, essential, or even desirable to a sound system of tax collection. Surely there is good sense in the careful and extensive procedures of review by attorneys in the Bureau and in the Department in all cases, civil and criminal. Yet the exercise by tax counsel of an important part of his function now runs the risk of being looked upon as synonomous with an effort to effectuate the so-called "fix". The difference is not even a fine one, but it is in danger of being obliterated entirely.

### Problem Is Most Serious in Civil Tax Liabilities

The situation in cases involving potential criminal prosecution is currently stealing the headlines. But the problem is infinitely more serious in connection with civil tax liabilities. That is the area which produces all but a small portion of tax revenue and which consumes by far the greatest portion of the time and effort of those actively involved in tax matters.

If the present publicity is an inevitable by-product of the current investigation, then everything possible must be done to minimize its impact upon the many thousands of honest employees. Certainly, that can be done without hampering an investigation designed to weed out of organizations as large and as far-flung as the Bureau and the Department, those few undesirable persons—those few rotten apples—which human experience teaches will inevitably be found in any group. (Incidentally, in my own experience of nearly thirty years of representing taxpayers before all echelons of the Bureau of Internal Revenue and the Department of Justice I have never encountered the slightest invitation to dishonesty, nor have I seen what the press is currently characterizing as "improper conduct".)

I offer these suggestions:

(1) Every investigating committee should take particular pains to inform the public that any disclosures of malfeasance on the part of *some* Bureau and Department employees are not to be taken as a broad indictment of all employees, and that the existing system of tax collection and administration is inherently sound and its over-all operation proper and honest. Such an announcement should stress the fact that the compromise of a pending tax controversy does not by any means connote impropriety; that compromise on the merits of such questions is an integral, necessary and desirable part of our system of tax administration.

(2) Every investigating committee should publicly assure the employees of the Bureau of Internal Revenue and the Department of Justice that no reflections are intended to be cast upon them as a group, and that Congress and the American people expect of them the continued exercise of their honest judgment and discretion in the performance of their vital duties in connection with the effective administration of our fiscal system.

(3) Every investigating committee should screen carefully and in advance the testimony it is to hear. If that testimony charges any official with misconduct the hearing should be closed and the accused given opportunity, also in closed hearing, to defend himself. In other words, an inquiry into wrong, corruption or impropriety should not be public. It should be conducted like a grand jury proceeding, for no man should be made to suffer in his standing and reputation except upon fair trial.

(4) A ban should be placed on the term "bureaucrat" and an educational movement should be carried out on broad lines to make people realize anew that public service is a high calling. Young men and women should be reassured that a life devoted to service to the government is a useful, worthy and patriotic career. Our Government can be only as good as the people who administer its laws and functions—the better they are, the better it is—and the public should keep that fact always in mind.

Meantime, friends in the Federal service, don't be disheartened by the discovery of a few rotten apples. Carry on your tasks with courage and confidence, for the great bulk of apples in the barrel are sound and good.

# Why the Law Is Fascinating:

# One Lawyer's Philosophy About His Profession

**by Peter H. Holme** • of the Colorado Bar (Denver)

■ This is not a "practical" article. It does not deal with cases or statutes or legal problems. Mr. Holme is not advancing a solution for one of the problems of the profession or arguing the merits of a theory or a pending bill. Because lawyers deal with controversy, laymen in general and even lawyers think of the profession in terms of partisanship and advocacy, and many of the articles in this *Journal* naturally are concerned with controversial issues and many of them seek reform of one sort and another. Mr. Holme looks at the profession from another point of view and here, writing of his own personal philosophy, he sees the lawyer as the peacemaker who settles the strife of his fellow men and thus earns their gratitude and his own satisfaction.

■ Within the past year former President Hopkins of Dartmouth College wrote me a letter, in which the following sentence appeared:

> On the subject of the way in which one arrives at valuable conclusions, I long ago became convinced that for myself at least the sure way of arriving at knowledge was to drop queries into my subconscious mind and I forget them, letting the mental processes of a conclusion formulate themselves and blossom at their own sweet will and in their own good time.

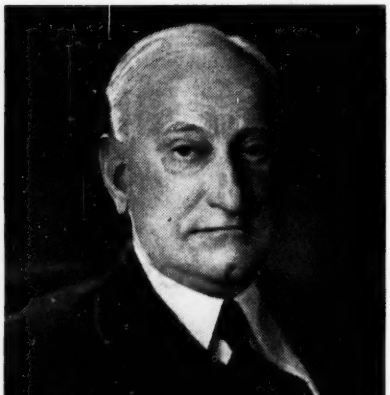
Many thoughtful people have doubtless had this same experience without being able clearly to define it or so beautifully to express it. On waking in the middle of the night many of us have had flashes that have seemed almost like visions, inspirations, or the sudden dawning of truth. In the experience of the writer these very occasional events have occurred while he has been engaged in the prosaic occupation of using his morning razor.

I had been doing more or less thoughtful reading for fifty or more years when in this fashion I suddenly discovered my own motive for reading. Ask yourself the question: "Why do I read?" I find that few persons have so examined themselves. Do not be satisfied by the commonest answer "I read for pleasure" or the terrible answer "I read to kill time." A little deliberation will yield a better and truer response, and if you once get that response I suspect that your reading thereafter will have in it much more point than it previously had.

For long years a substantial number of the oncoming generations have been deeply concerned in the matter of selecting their vocations. If these selections have not been predetermined for them by the conditions and influences under which they have been reared, it may be fairly assumed that the right-thinking young person, feeling that he has a real freedom of choice, desires to select a calling or an occupation which will enable him to provide not only for the more sordid essentials of life, but also for a life of definite usefulness to his generation. All are seeking for the good life. Many want the useful life.

In the development of our scheme of so-called higher education increasing numbers of young people are giving serious thought to this matter of selection in advance of making a definite plunge. The inevitable period of groping—inevitable for those who are not peculiarly gifted—seems to be starting earlier than it did fifty years ago. The young people seem to be more conscious of the desirability of emerging from this spell of uncertainty in time to make the most of the possibilities of training so generally open to them in these days. So we hear more than we used to hear of premedical studies, prelaw studies, preprofessional and prevocational training of all sorts.

Man from the very beginning has sought to peer through the veil that hides the future. He has an instinctive longing for the things that make for security. He longs for the things he can count on. He has these longings despite his knowledge that all he can definitely count on is ceaseless flux and change. We want planned economies. Today we hear more and more of city planning. This is all human and natural, and to some extent it seems to work. We cannot let the fact that it is often futile make us improvident or thrift-



**Peter H. Holme** was born in Denver in 1877. He received his A.B. degree from Yale in 1898 and taught in the Denver public schools for two years after he was graduated. He received his law degree from Harvard in 1903 and has been practicing law in Denver since then.

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less. We know we can get somewhere with planning and its benefits, even though often temporary, cannot be ignored.

Narrowing our thoughts to the problem of the selection of a profession among the vast number of vocations open to youth and still further narrowing these thoughts to the three professions broadly designated as those of engineering, medicine and law, some helpful suggestions possibly may be made.

### Engineers Are the True Pioneers

The engineers have come to be, and possibly they have always been, our true pioneers. They are the workers whose real objective has been the adjusting of the world in which we live to the needs of human beings. They have been constantly engaged in the task of creating out of the physical world conditions which will benefit mankind and effect adjustments between it and the unsympathetic material world in which mankind is placed. Look where you will, whether it be at the building of bridges or railroads or docks or skyscrapers, whether it be at the great reclamation projects, the vast fields of electrical development, or the apparently endless means for aiding human communication, or the wide domain of chemistry, you will find the engineer's job concerns itself with making human life a better thing to live and this world of ours a better place in which to live it. We hear it often suggested that the frontier days are a thing of the past—"America has no frontiers left". This may be true in a sense but only in a limited sense, for until we have reached the millenium we are going to discover ever new frontiers to be explored and integrated with what man has already done. It is true of course that some engineers lack breadth of vision and become so absorbed in the solution of the immediate and possibly petty problems that they lose sight of the great ideal of their profession. That, however, is merely a common weakness in almost every field of human endeavor. In appraising the work of the engineering profession it seems that when all is said and done it is a sort of condition precedent not only to the work of the other professions but to most of the other work of the world.

### Unselfishness Is the Basic Principle of the Medical Profession

In the scheme of human life it would be difficult to assign the great profession of medicine to a secondary position. It comes too close to us. It touches our lives and our feelings too intimately. The engineers may build our dwellings and provide the material contexts for our lives; the lawyers may spend most of their time protecting our pocketbooks and our other property interests; but the doctors work day and night to save our dear ones. In their endeavors they may be seeking to arrest or postpone the great Law of Survival but when that Law concerns us and those nearest to us, we are glad to have their efforts ceaseless. Of all the professions there seems to be none more dependent than the medical profession upon the basic principle of unselfishness.

Finally we come to the third great profession selected for discussion and that is the profession of the Law. What are some of the reasons for the Law's having had its great place in the lives of men? Why has the Law possessed fascination for its votaries? Human beings, or at least the human beings whom we have had an opportunity to know and to observe in our favored part of the world, seem individually to be a pretty good sort. Most of them, taken one at a time, would like to be decent beings, would prefer to bring up their children to be good citizens, would like to learn more of the world in which they live, would enjoy the ability to surround themselves with more and more things of beauty and to appreciate them. Most of these beings, taken one at a time, if given their choice would prefer to be kindly and helpful rather than to be cruel and destructive. Yet with all these more or less primary impulses they have the most extraordinary aptitude for getting into trouble with each other the minute they try to live together. I do not know if anyone can say why this should be so, but viewing these beings that seem to be gregarious, we find this ineradicable tendency to misunderstand each other, misinterpret the motives of each other and ultimately to enter into conflicts with each other of more or less serious nature. This seems to be true whether you look at the initial unit of the family or the greater unit of the nation, or the still greater group of the family of nations.

As I have already indicated, no one seems to be wise enough to say why this should be so. But the condition confronts us.

The existence of this unpleasant reality furnishes the field of operation for the Law. The lawyer, day in and day out, is concerned with the problem of trying to make human beings live in co-operative groups without cutting each other's throats.

Whether we look at the drafting of treaties, of constitutions, of statutes, of contracts, of wills, of trusts,

or of any other documents that a lawyer attempts to draft, we find that the purpose of these things is to lay down rules for the guidance of human beings. How can we design these instruments so as to furnish clear and understandable rules of conduct for the parties concerned?

The phase of the lawyer's work just outlined may possibly be described as the constructive, the forward-looking part of a lawyer's job. On the other hand his best designed documents are subject to the frailties of most human products and those for whom he has attempted to lay down rules of conduct find that they are not clear. The approach of the persons concerned is not always a sincere approach. When the troubles start the troubles multiply, and no imagination is vivid enough to foresee and guard against the difficulties and the conflicts that may arise. And then it becomes the lawyer's duty to attempt to adjust these differences, to approximate justice and fair dealing. I suspect that if we had the statistics of the work in the offices of the real lawyers of our society, we should find that an exceedingly small proportion of the matters coming to their attention fails of some sort of amicable adjustment. The percentage of controversies taken into court is small. Despite the tedious and nerve-wracking phases of litigation, the judges who are lawyers have the objective of working out decent adjustments and avoiding a resort to force.

### Lawyers Are Peacemakers—Not Stirrers-Up of Strife

Unfortunately, and I believe for the most part undeservedly, the lawyers have come to be looked upon as stirrers-up of strife and the jibes at the profession are found in writings centuries old. And so the average group of laymen would doubtless smile at what follows:

In the Beatitudes I find that with the possible exception of the doctors, who may have been in mind when the words were used—"Blessed are the merciful"—the only group of men distinctly mentioned was that of the lawyers—"Blessed are the peacemakers". Fairly appraised, do they not deserve this tribute? Can any other recognized group in our social body make a claim comparable to the legitimate claim of the legal profession that it consists of peacemakers?

Why is the Law fascinating? Until some created thing is found in this world of ours more mysterious, more wonderful, more varied in its potentialities and attributes, than mankind, can any field of greater fascination be conceived than the field which involves the adjustment of human relations? Its variety is infinite; its problems are ever new; the solution of one, while it may help in the solution of another, can never become universal. The picture is kaleidoscopic. No two human beings look alike, think alike, act alike, or are subject to identical hereditary or other influences.

So this suggests the answer to the query, and it burst upon me one morning when the razor was poised for its destructive attack. The job of the Law is to make these human beings, no one of whom is on earth because he asked to be, find a way of getting along together, and this apparently they have to do or else destroy themselves or become hermits. The unending task of adjusting human relations may be the thing that gives the Law its fascination.

# Special Train and Hawaiian Holidays

■ There continues to be a large response to the article in the February issue of the JOURNAL announcing the Special Train to the San Francisco Annual Meeting. Already the minimum requirements for the operation of the Special Train have been far surpassed. Many of those who have made their reservations are Special Train "Alumni" of former Special Train parties to the Pacific Coast. The train leaves Chicago, September 7, arriving in San Francisco, September 14, stopping en route at Old Santa Fe and the Indian Country, the Grand Canyon, three days in Los Angeles and one day at Yosemite National Park. Returning on September 19, the train will make an interesting stop outside of Ogden, Utah, at the Navajo Indian school and Bear River Bird Refuge before arriving at Sun Valley for a three-day visit, thence on to Chicago.

The two Hawaiian Holiday tours also mentioned in the February issue have proved popular and from all indications will be sold out in the near future. The pre-Meeting trip leaves Los Angeles on the *S. S. Lurline* on August 25, arriving at Honolulu for a fourteen-day stay at the Royal Hawaiian Hotel on Waikiki Beach, returning to San Francisco by air prior to the opening of the 75th Annual Meeting on September 15. The post-Meeting Hawaiian Holiday leaves San Francisco by air September 19 or 20, and provides for a fourteen-day stay, also at the Royal Hawaiian Hotel, returning to the mainland on the palatial *Lurline* from Honolulu, October 4. Both the Hawaiian trips are identical in mode of transportation used, length of time in Hawaii, and in price. Optional sidetrips by air are available from Honolulu to the Islands of Kauai, Hawaii and Maui, and an allowance is made for the time away from the Royal Hawaiian Hotel. Accommodations aboard the *Lurline* are becoming increasingly difficult to secure for both dates and those planning to take either trip should apply for reservations immediately.

Reservation request or application for descriptive booklets on both the Special Train and Hawaiian Holidays, explaining in detail the itinerary and costs involved should be directed to W. M. Moloney, Room 711—105 West Adams Street, Chicago 3, Illinois.

# Regional Meeting: Louisville, Kentucky, April 9-12

■ Preceding the Regional Meeting, the Kentucky State Bar Association held business and general sessions during part of Tuesday and all of Wednesday. Maxey B. Harlin, Jr., of Bowling Green, was chosen to succeed John L. Davis, of Lexington, as its President. On Wednesday evening, President John L. Davis tendered a personal dinner to President Barkdull and the presidents of the state bar associations of Illinois, Indiana, Michigan, Ohio and West Virginia. At that time, a large exhibit hall was opened for the duration of the meeting to demonstrate the many ways in which a lawyer can work more efficiently and effectively. Many lawyers expressed their pleasure at the opportunity to examine books and law office equipment at their leisure. Some lawyers took the trouble to thank the exhibitors personally for their help in making the meeting a success as well as for the financial help that they afforded.

Wednesday evening at eight o' clock, the Assembly was opened by American Bar Association President Howard L. Barkdull, presiding along with the six state bar presidents. He introduced the American Bar Association officers, Board of Governors members, House of Delegates members and Section officers as well as Blakey Helm, Director of the meeting, and his Co-ordinating Committee. After short welcoming addresses by Charles P. Farnsley, Mayor of Louisville, J. D. Buckman, Kentucky's Attorney General, acting for Governor Weatherby, who was out of the state, President Marshall P. Eldred, of the Louisville Bar and President John L. Davis of the Kentucky Bar, brief responses were made by state bar presidents, Ben C. Boer, of Cleveland; Roger D. Branigin, of Lafayette, Indiana; Lester P. Dodd. of Detroit; Joseph H. Hinshaw, of Chicago; and Wright Hugus and C. W. Strickling, both of West Virginia. In the absence of Burt J. Thompson, of Iowa, Chairman of the Regional Meeting Committee, E. Smythe Gambrell, of Georgia, gave the principal address on "The History and Future of American Bar Association Regional Meetings". The Governor's Commission of President Barkdull as a Kentucky Colonel was then presented, and the Assembly was adjourned. A mixer party followed.

Thursday morning, a capacity audience heard the Insurance Law Section's trial tactics panel in which Clarence W. Heyl, of Peoria, was Chairman and Chief Justice James W. Cammack, of Frankfort, was Moderator. The panel members were Lon C. Hocker, of St. Louis, R. P. Hobson, of Louisville, Erwin W. Roemer, of Chicago, and President Joseph H. Hinshaw of the Illinois State Bar Association.

Meanwhile, President Ben C. Boer of the Ohio State Bar Association was presiding over a course in legal draftsmanship in which Alan Loth, of Fort Dodge, Iowa, lectured on "drafting legal papers" and Thomas S. Edmonds, of Chicago, spoke on "Drafting Problems in the Disposition on Death of Partnership Interests" to a large audience. There was a complimentary coffee hour for the ladies.

President Wright Hugus of the West Virginia State Bar Association was toastmaster at the general luncheon where Leroy A. Lincoln, Chairman of the Board of Directors of the Metropolitan Life Insurance Company, spoke on "The Four Horsemen: Some Observations on Social Security". That afternoon President Barkdull presided over an Assembly session devoted to world affairs. Wilson W. Wyatt, of Louisville, as panel Chairman, introduced James E. Webb, former Undersecretary of State, who spoke on "Our Foreign Relations and How They Are Conducted"; Paul Carrington, of Dallas, who spoke on "As To Our Foreign Policies, 'United We Stand, Divided We Fall' " and Major General George H. Olmstead, U.S.A., Director of the Mutual Defense Assistance Program. The Louisville Bar Association was host at a general cocktail party at the Pendennis Club immediately afterwards. That evening there were several dinners, one being the Women Lawyers Regional Dinner for the National Association of Women Lawyers. Mrs. Laura Miller Derry, of Louisville, Past President of N.A.W.L. was toastmistress. Greetings were extended by Mrs. Mary H. Zimmerman, of Detroit, President of N.A.W.L. and by Mrs. J. Helen Slough, of Cleveland, the N.A.W.L. Delegate to the American Bar Association House of Delegates. This was concluded by an address by Judge Burnita Shelton Matthews of the United States District Court for the District of Columbia. Also, there was the Annual Dinner of the Kentucky Judicial Conference over which Chief Justice James W. Cammack presided as toastmaster. In addition, there was the Regional Meeting Dinner of the Junior Bar Conference at which John A. Fulton, of Louisville, was toastmaster and where the principal address was given by President Roger D. Branigin of the Indiana State Bar Association. These dinners were followed by an informal Regional Meeting Dance and by complimentary moving picture shows on "The Nuremberg Trials" and "English Criminal Justice".

On Friday, Chairman Charles B. Nutting, of Pittsburgh, presided over a meeting of the Administrative Law Section. Papers were presented by Murray Seasongood, of Cincin-

nati, on "Procedural Aspects of Loyalty Board Hearings" and by Neville Miller, of Washington, D.C., on "Procedural Problems in Practice before the Federal Communications Commission".

The Section of Corporation, Banking and Business Law held a meeting over which Ray Garrett, of Chicago, presided. The general theme was "What's New in Corporation Law?" There was a panel discussion of "Statutory Treatment of Capital and Surplus", "Indemnification of Directors and Officers", "Restated Articles of Incorporation" and "Definition of What Constitutes Doing Business by Foreign Corporations" by Whitney Campbell, of Chicago; William H. Nieman, of Cincinnati; Kurt F. Pantzer, of Indianapolis; and Charles W. Steadman, of Cleveland.

Franklin J. Marryott, of Boston, Chairman of the Insurance Law Section, presided over a meeting devoted to "Limitation of Assured's Consent to Use of Automobile as Affecting Liability of Insurance Carrier", by William E. Knepper, of Columbus, "Disability Benefits—Implications for the Legal Profession" by James F. Moore, of New York, Social Security Consultant to the Standard Oil Company of New Jersey; "Exclusiveness of Remedy Provisions of Workmen's Compensation Laws" by Frederick W. Kaess, of Detroit; and "Owner's Liability for Injury to Contractor's Employees on the Premises" by Clifford A. Mitts, of Grand Rapids.

Judge Harold R. Medina, of New York, Chairman of the Section of Judicial Administration, presided over a meeting arranged by Chief Judge Bolitha J. Laws, of the United States District Court for the District of Columbia, with open discussion on suggestions for improvements in courts, court procedure and facilities led by James S. Pope, of Louisville.

The Junior Bar Conference held a large business meeting over which its Chairman, Paul W. Lashly, of St. Louis, presided.

The Section of Labor Relations Law met under the leadership of its Chairman, Barnabas F. Sears, of Chicago, for a program by Justin Miller, Chairman of the Salary Stabilization Board, Washington, D.C., and Benjamin Werne, Chairman of the Section's Committee on Wage and Salary Stabilization. Nathan Feinsinger, Chairman of the Wage Stabilization Board, was detained in Washington by the steel strike and was replaced by Mr. Trippe, economist for that Board.

The Taxation Section met under Bernard H. Barnett, of Louisville, for a demonstration on "Corporations as Against Partnership Organization" by Merle Miller, of Indianapolis; S. Russell Smith, of Louisville; Wesley Dierberger, of Indianapolis; William Schwerdtfeger, of Louisville; and Lester Ponder, of Indianapolis.

The Special Committee on Legal Service to the Armed Forces held a meeting under Harry Shriman, of Chicago, the Committee Secretary. This was a panel discussion by representatives of the Armed Services and of the National Legal Aid Association. It was a large session attended by legal aid officers from the Services. The participants were Emmet R. Field, of Louisville, Director of the Legal Aid Bureau; Colonel C. F. Cordes, Jr., J.A.G.C., Chief, Legal Assistance Branch, Office of the Army Judge Advocate General; Commander David Hume, U.S.N., Head of Legal Assistance Branch, Office of the Navy Judge Advocate General; and Major Allen C. Schieck, U.S.A.F., Chief of Legal Assistance, Office of the Air Force Judge Advocate General.

The alumni assembly luncheon was another overflow crowd. Judge Mac Swinford, of the United States District Court for Kentucky, was toastmaster. The law school alumni groups were seated by tables and were recognized by Dean A. C. Russell of the University of Louisville School of Law. Harold J. Gallagher, of New York, Past President of the American Bar Association, then introduced Judge Harold R. Medina of the United States Court of Appeals for the Second Circuit, who gave the principal address, which was enthusiastically received. Following a pause for Good Friday services at the nearby churches, there was a workshop on law office management over which President C. W. Strickling of the West Virginia Bar Association presided. John E. Mulder, Director of the Committee on Continuing Legal Education of the American Bar Association and the American Law Institute, introduced the principal speakers, Francis Price, of Santa Barbara, California, and Paul Carrington, of Dallas.

At the same time, a Pretrial Demonstration was conducted by Chief Judge Bolitha J. Laws in the federal courtroom covering "A Damage Claim for Negligence Causing Fire" in which Fred P. Bamberger, of Evansville, Arthur W. Grafton, of Louisville, and Martin R. Glenn, of Louisville, participated. It also included "Court Control over Union Dealings with their Own Members" with Murray Seasongood, of Cincinnati and Lester P. Dodd, of Detroit; "A Damage Claim from a Passenger on Collision by a Taxicab with a Truck", with Athol Lee Taylor, Marlow W. Cook, Edwin O. Davis, all of Louisville and "An Equity Action To Determine Rights to Proceeds of an Insurance Policy" with Clarence W. Heyl, of Peoria, Leo T. Wolford, of Louisville, and Telford B. Orbison, of New Albany, Indiana.

The Regional Meeting Banquet was another overcapacity crowd with Judge Shackelford Miller, of the United States Court of Appeals for the Sixth Circuit, as toastmaster. The principal address by John Foster Dulles on "The Negotiation of Treaties" was Mr. Dulles' first public utterance since severing his connection as Special Representative of the President of the United States in negotiating the Japanese Peace Treaty and the Pacific security treaties.

The Saturday program was devoted to a motorcade trip from Louisville to the Calumet Farm, through the bluegrass region, to the

*(Continued on page 493)*

# Books for Lawyers

LEGAL AID. *By Eric Sachs, Q.C. With a foreword by the Lord Chancellor, Viscount Jowitt. London: Eyre and Spottiswoode. 1951. 36s net. Pages 466.*

The adoption by the English Parliament of the Legal Aid and Advice Act in 1949 is a matter of immediate concern to all members of both branches of the legal profession in that country since, as stated by Viscount Jowitt, the Lord Chancellor, in the introduction to this book, the plan "may well affect the majority of litigants, either as recipients of legal aid, or as opposing such recipients, and directly affects the vast majority of lawyers". Although the operation of the plan is now limited to providing representation in the civil courts in matters requiring actual litigation and does not cover the giving of advice or service on disputes that require something more than advice but less than litigation, it covers citizens who can pay part fees as well as those who can pay none. Moreover, the service is provided under the auspices and control of the organized Bar through barristers and solicitors in private practice selected by the client. It is therefore obvious that a majority of practitioners are involved in the application of the measure and that a comprehensive guide to the operation and provisions of the Act was needed.

Eric Sachs, a member of the first planning committee of the Law Society under the Legal Aid and Advice Act, has produced a clear and complete résumé of the scope of the measure as presently enforced and something of a forecast of what is anticipated when it is fully implemented. The purpose of the work is to offer the lawyers whose practice is affected unofficial but authoritative information as to what persons are eligible for state aid for the legal services covered, the amount of such assistance and the method of securing payment from the government. Also included in the volume are rules as to rights and liabilities regarding costs—and in England attorney fees are assessed as such—a description of the administrative machinery which has been established by the Law Society under the general guidance of the Lord Chancellor, and a consideration of the duties, rights and liabilities of the legal profession under the Act.

Yet to be put into effect are provisions which extend and strengthen the existing system of legal aid in criminal cases (Part II of the Act) and for legal advice and preliminary legal aid (Sections 5 and 7 of Part I). While serious deficiencies now prevail in securing the benefit of representation by counsel of indigents accused of crime, a more critical situation exists with respect to necessary legal services short of court action in civil matters. It is the experience of legal aid offices in the United States, and presumably of lawyers in private practice, that the number of cases requiring court work is relatively small—rarely exceeding 10 per cent of the total. Other types of legal service, especially timely preventive counseling, are as much needed by the average citizen and actually reduce the volume of litigation. In its first report, the Council of the Law Society which has administrative responsibility for the operation of the Act, stated that "the absence of a comprehensive legal advice service has placed an additional burden on solicitors generally and, in particular, on the society's staff, in that they are being called upon to assist applicants to complete forms of application for legal aid, work which would to a large extent be done by legal advisers under a legal advice scheme and which as things are, is inevitably slowing down the administration of the Scheme. In the view of the Council, the provision of legal advice is complementary to the provision of legal aid, which latter service will never be really effective until the provisions for legal advice are brought into operation."

Only in London and the larger cities are there legal advice centers of the "poor man's lawyer" type and these are maintained largely by lawyers and private philanthropy. As Mr. Sachs states "for a high proportion of the population, legal advice is in practice out of reach—a position that has become yearly the more serious as the complexity of legislation increased". As to service beyond advice in matters not involving litigation, there are now almost no facilities and even after the Act is fully effective, there will remain a large gap which must be filled by voluntary organizations.

This book with its appendices containing the Act itself, the regulations and forms which have been adopted thereunder, and the effective statutes and regulations relating to legal aid in criminal cases, has no doubt become indispensable to a majority of English lawyers. Lawyers in the United States who are concerned with legal aid or with the operation and effect upon the profession of a country-wide, tax-supported legal aid system, will find the volume both interesting and informative.

EMERY A. BROWNELL
Rochester, New York

ADMINISTRATIVE AGENCIES AND THE COURTS. *By Frank E. Cooper. Ann Arbor: Michigan Legal Studies, University of Michigan Law School. 1951. $5.00. Pages xxv, 470.*

Professor Cooper's purpose, as announced in his preface, is to ex-

amine the relationship between administrative agencies and the courts, with particular reference to judicial doctrines concerning: (1) constitutional limitations on the delegation of powers to administrative agencies; (2) procedural requirements in cases where agencies exercise judicial powers; (3) procedural and substantive requirements imposed in connection with rule-making activities; (4) methods and scope of judicial review. The volume will be of little use to the lawyer who asks from his books only that they provide him with a series of citations to support any contention. But it will be a valuable addition to the library of any lawyer who wishes to broaden his insight into the administrative process, its roots, its methods and its results. In appraising the book as a whole the reviewer can do no better than to quote from Dean Stason's foreword: "In this volume we have something a little different in the literature on administrative law—a systematic treatment, not too detailed for the student and the novitiate, yet sufficiently detailed to provide the general background essential to a practical understanding of the relationship between the courts and administrative agencies in this country."

The author brings a welcome objectivity to his task. He recognizes the need for changes in agency procedure. He is concerned, as are most agency officials themselves, with the problems—inherent in the nature of the administrative process—that arise from the fact that the agency itself is nearly always a party in interest in cases coming before it. Professor Cooper is among those who believe that much more can and should be done to separate the policy-making and judicial functions within agencies. He feels that Section 11 of the Administrative Procedure Act, granting an independent status to federal hearing examiners, is a considerable advance. He also recognizes that informality of procedure is necessary and desirable in many administrative proceedings. But he feels that a rather high degree of formality should be maintained in complicated adversary proceedings such as are often brought before agencies like the Federal Trade Commission and the National Labor Relations Board. Lawyers will surely welcome this approach.

Professor Cooper makes many good suggestions, among them a recommendation for the establishment of procedural rules designed to set up a regular system of pretrial hearings. This was one of the recommendations of the Attorney General's Committee on Administrative Procedure. Senate Document No. 8, 77th Congress, 1st Session (1941), page 67. Section 5 (b) of the Administrative Procedure Act reflects the Congress' interest in the matter. It is interesting to compare Professor Cooper's recommendation with that contained in the *Report of the Judicial Conference Advisory Committee on Administrative Procedure* (1951). This distinguished committee too felt that adequate and effectual provision for prehearing conferences was very much needed.

There is an extremely interesting discussion of the extent to which agencies may take official notice of facts *dehors* the record. One of the principal reasons for having administrative agencies is to have adjudicators who have a background of expert knowledge to draw on. Indeed, Professor Cooper recognizes that the extent to which a reviewing court conceives that there is a genuine need for ***expertise*** is an important factor motivating a decision upholding a delegation of power to the agency. It would be interesting to have Professor Cooper's comments on the implications of the decision in *Osage Nation* v. *United States,* 119 Ct. Cls. 592, *cert. den.* 342 U.S. 896 (1951). There, the Court of Claims, sitting as a court reviewing an administrative agency, the Indian Claims Commission, reversed the Commission largely on the basis of facts of which it, the Court of Claims, took judicial notice and which had not been considered by the Commission. If the decision were to be applied generally in the federal judicial system, one would expect to find an even wider and perhaps ill-advised expansion of the use of the device of official notice.

The chapters on delegation of powers, the role of discretion, and judicial review are extremely penetrating and provocative analyses of these fundamental and difficult concepts. Professor Cooper recognizes, as indeed all must, that "It is fundamentally the attitude of the courts, rather than the provisions of statutes, which determines the actual scope of judicial review; and as both federal and state courts have come to grant increased respect to administrative determinations, the extent of review has been narrowed." It is unfortunate that the author did not undertake an analysis of the meaning of Section 10 of the Administrative Procedure Act. He does little more than note that a controversy exists as to whether or not it has expanded the scope of judicial review. To this reviewer it seems that Section 10 (a) as well as Section 10 (e) affects the scope of judicial review. Section 10 (a) grants judicial review to anyone "suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action, within the meaning of any relevant statute". This provision does expand the scope of, as well as the right to, judicial review. See, for example, *Air Line Dispatchers Association* v. *National Mediation Board,* 189 F. 2d 685 (App. D. C. 1951); *cert. den.,* October 15, 1951, 20 U. S. Law Week 3096.

Professor Cooper's book is a welcome addition to the literature in the field of administrative law. He writes well. The volume is attractively printed and well indexed. The Administrative Procedure Act is set out in an appendix and there is a useful table of cases and bibliography.

CHARLES S. RHYNE
Washington, D. C.

# THE PRESIDENT'S PAGE

Trout-Ware

HOWARD L. BARKDULL

### Individual rights

■ Mention was made on this page in the May issue of the JOURNAL as to the importance of the Committee on Individual Rights as Affected by National Security, created by the House of Delegates at the Mid-Year Meeting. The personnel of this Committee is now complete, consisting of the following: *Chairman,* Whitney North Seymour, of New York; Frederick A. Ballard, of Washington; James M. Douglas, of St. Louis; Albert J. Harno, of Urbana, Illinois; Ross L. Malone, Jr., of Roswell, New Mexico.

### Disciplinary Procedures

The May issue of the JOURNAL referred also to another new Committee, dealing with the subject of disciplinary procedures. The persons constituting this group are as follows: *Chairman,* Forrest C. Donnell, of St. Louis; Ben C. Boer, of Cleveland; Charles Leviton, of Chicago; Shackelford Miller, Jr., of Louisville; Orie L. Phillips, of Denver.

### Louisville Regional Meeting

A detailed account of the Regional Meeting at Louisville, April 9-12, appears elsewhere in the JOURNAL (see page 486). A few personal observations and comments will supplement that story.

From the standpoint of the Association the fact is highly important that the Louisville meeting was an outstanding occasion in every department. A failure at this time would have been most serious, whereas the distinct success of the event gives tremendous impetus to the policy of Regional Meetings and their place in the future program of the Association.

At an occasion of this kind the Association brings to its membership the work of our Sections and Committees. It assembles at a place not far removed from the homes of many members of the Association who never do attend an Annual Meeting. This is exactly what happened at Louisville, and the important thing is that the lawyers coming to the meeting stated that it was by all means worth the time and money. In fact, after the Thursday morning session on trial tactics many people came up to me and said that if there should be nothing more than that one session, the meeting was a great success.

I wish to take this occasion, on behalf of the Association to thank every member of the Committee putting on the Regional Meeting, each participant in the program, and the entire Bar of Louisville and of Kentucky for the fine entertainment and hospitality.

### Honor in One's Own Country

An event meaning a great deal to me personally was held on the evening of Thursday, March 20, when a dinner in my honor was given by the Church of the Ascension, the Episcopal Church in Lakewood, a suburb of Cleveland, where Mrs. Barkdull and I are communicants. It was entirely different from all other meetings held during the course of the year, and I spoke at considerable length, in an informal manner, concerning the work of the American Bar Association as well as the duties and some of the tribulations of the President. Coming at the exact midpoint of the present Association year, the occasion afforded an excellent opportunity for a review of the six months past and a glance ahead at the similar time to come. I hope to have a sufficient degree of common sense (and time) to give heed to the many injunctions of good friends at this dinner, as to the protection of one's health.

### Student Delegates at San Francisco

In case you are driving your own car to the San Francisco meeting next September and are planning to arrive a day or so in advance of the opening day, you can be of real service to our law school organization, the American Law Student Association, by giving transportation to one or more law student delegates. These men have to stand their own expenses and the item of transportation is one of real consequence.

The American Law Student meeting is scheduled to begin on Friday, September 12. If you plan to reach San Francisco on the twelfth or one day before or after that time and have room in your car for one or more student delegates, it is suggested that you contact the student bar president of the nearest law school. Incidentally, you will no doubt welcome the opportunity of turning over some of the driving to your guests.

### Itinerary

The early spring is a season between the state bar meetings of the winter and those held in May, June and July. The temporary respite in addressing bar associations has made possible the acceptance of more invitations to speak at the law schools. It was an unusual pleasure to be able to attend Supreme Court Day at Drake University School of Law in Des Moines, including the presentation of the practice case on appeal to the state supreme court before the full Bench of that court in the State House. This was followed by the installation of Drake Chapter, Order of the Coif, at the law school.

At Indiana University I attended the fifth annual *Law Journal* banquet for former *Journal* members, members of the Bar and judges, pre-

ceded by an informal luncheon with the *Journal* personnel. I was impressed with the degree of independence bestowed by the faculty of the law school on the students making up the staff.

Attending the Louisville Regional Meeting required a complete week, but from the standpoint of the Association these days were as profitable as any similar period during the entire year. There were many incidents of personal interest to your President, including the receipt from the Attorney General at the opening session of a commission as Kentucky Colonel, and the unique assignment of presenting the trophy to the winner of the Ashland Stakes at Keeneland race course Saturday afternoon.

# Notice to Members of Junior Bar Conference

■ Notice is hereby given that at the Annual Meeting of the Junior Bar Conference, to be held in San Francisco, California, September 13, 14, 15 and 16, 1952, there will be elected a Chairman, Vice Chairman and Secretary, each for a term of one year, a Member of the Executive Council from each of the Second, Fourth, Sixth, Eighth and Tenth Federal Judicial Circuits and a Member-at-Large from the Ninth and Tenth Circuits, each for a term of two years.

Pursuant to Section 4 (B) of Article IV of the By-Laws, and the provisions of the *Manual* with respect to the new election procedure, notice is hereby given that members of the Junior Bar Conference may nominate candidates for the office of Chairman, Vice Chairman and Secretary, and for the office of Member of the Council from their respective Districts, by written petition, in each case, specifying the name of the person nominated and the office for which nominated, containing the names of at least twenty endorsers, which in the case of a Member of the Council must all be residents of the District of the person nominated. The petition shall state briefly a biographical sketch of the background and qualifications of the candidate. A petition to be considered shall be submitted to the Chairman, Paul W. Lashly, 1208 Arcade Building, St. Louis, Missouri, not later than June 15, 1952. The Chairman shall cause to be published in the July issue of *The Young Lawyer,* the name and address, and, if possible, the brief biographical sketch of each person for whom a petition for the office of Chairman, Vice Chairman or Secretary, has been submitted, designating, in each instance, the office for which each petition has thus been submitted.

At the first session of the Annual Meeting, the Chairman shall appoint a Nominating Committee in the manner specified in the *Manual* regarding the new election procedure. The attention of the Members of the Council and State Chairmen is specifically called to this portion of the *Manual,* in order that its provisions may be carried out in as democratic a manner as possible. At such first session the Chairman of the Conference shall deliver to the Chairman of the Nominating Committee all petitions submitted pursuant to this notice.

The Nominating Committee shall not nominate for the position of Chairman, Vice Chairman or secretary, any person for whom a petition has not been submitted as herein provided, except that this provision shall not apply where no petition has been submitted on behalf of anyone in connection with the office in question. If a petition has been submitted on behalf of anyone for the position of Chairman, Vice Chairman or Secretary, such person may be nominated by the Nominating Committee for any of such offices, or as a Member of the Council for the particular Circuit or District of that candidate.

The Nominating Committee shall consider the candidates proposed by each of said petitions, and, in the case of nominees as Members of the Council, shall receive the names of other candidates, and shall report its Council nominees at the same time and place and in the same manner that it reports the nominations for the officers of the Conference. Other nominations for the Council may be made from the floor following the report of the Nominating Committee, as may other nominations also be made for the offices of Chairman, Vice Chairman or Secretary.

The election of the Members of the Council shall take place at the same time and place, and in the same manner, as the election of officers, immediately following the conclusion of the second general session of the Annual Meeting, and shall be by written ballot.

The terms of office of the officers shall begin on January 1, 1953, and shall continue until December 31, 1953, or until their successors shall have been elected and qualified, and the terms of office of Council Members from the Second, Fourth, Sixth, Eighth and Tenth Federal Judicial Circuits and a Member-at-Large from the Ninth and Tenth Circuits, shall begin on January 1, 1953, and shall continue until December 31, 1954, or until their successors shall have been elected and qualified.

No person shall be elected as an officer or Member of the Council if he will, during his term of office, become ineligible for membership in the Conference. The membership of a Member of the Conference shall terminate at the end of the calendar year within which the member attains the age of 36 years, or upon his ceasing, prior to that time, to be a member of the American Bar Association. A person elected as a Member of the Council shall be, at the time of his nomination, a resident of the Council District for which he is chosen. No person shall be eligible for election as a Member of the Executive Council if he is then a member of the Council, and has been such a member for a period of three consecutive years or more.

ROBERT A. STUART
*Secretary, Junior Bar Conference*

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## ■ *Judicial Qualification*

It is pleasant and encouraging to learn that Senator Wiley of Wisconsin is still seeking to advance the principles advocated and urged by the American Bar Association to guide the appointing power in the selection of members of the Federal Judiciary. During his tenure as Chairman of the Senate Committee on the Judiciary, he was a staunch supporter of our ideals, always watchful for the opportunity to encourage improvement in the quality of our judges. And his eminent successor in the chairmanship, Senator McCarran of Nevada, has carried forward with distinction the work of the committee in the same tradition.

In the *Congressional Record* of April 7, Senator Wiley extended some general observations on the subject of the appointment of federal judges.

Among other things, the Senator said:

"When I was Chairman of the Senate Judiciary Committee during 1947-48 in the period of the Republican 80th Congress, I commented on quite a few occasions, in connection with nominations to the judiciary, that there is a tremendous—relatively untapped pool of top-notch private legal talent available throughout the Nation. There are in every judicial district considerable numbers of outstanding men and women who are regarded, irrespective of political party, as great practitioners of the law, possessing years and years of varied private experience—men and women who would make excellent material for the Federal bench."

And again:

"On relatively too few occasions has a situation occurred where a judgeship nomination has met, for example, with practically universal acclaim, with all sections of the bar giving eager and enthusiastic endorsement because an individual of the highest stature has been appointed—an individual of towering legal ability and background.

"The fact, for example, that the American Bar Association or a state or city or county bar may say that it has no objection to a nomination . . . is not enough in my judgment to justify any complacency on our part. Lack of objection is obviously not an affirmative demonstration of enthusiastic and unanimous approval."

## ■ *Apples*

The article appearing in this issue "On the Selection and Keeping of Apples" (page 479) by Edgar J. Goodrich strikes a note which is as refreshing as it is timely in these days when it is popular to presume the misconduct of most government officials from the publicity attending the investigation of misconduct on the part of a few. Surely members of the Bar should heed Mr. Goodrich's message. Lawyers are the first to resent attacks upon all members of our profession because of the dereliction of a few whom the profession itself investigates and disciplines. In our eagerness to police the Bar we are not misled into suspicion of all lawyers. We feel that our vigilance in this direction is the best protection afforded the public, and should be the vindication of all faithful practitioners. With government officials it should be the same. In Mr. Goodrich's metaphor, let us not be led into rejecting all the apples because some are bad.

## ■ *The House of Delegates*

It is perhaps not demonstrable that our House of Delegates is among the greatest deliberative bodies in the world. But the performance of the delegates at the recent Mid-Year meeting was cogent evidence of the fact. The makeup of the House in itself gave great assurance. Here were gathered about 200 leaders of the Bar from all parts of the nation. They were men and women of character and intellect; those whose records justified their selection. They were there because of their live interest in the efforts of the organized Bar to improve the quality of its service to the public and to make the administration of justice under the law ever more prompt, more readily accessible to all and more effective.

Here is the natural outlet for the exercise of the lawyer's special talents. He is trained and skilled in debate, discussion, deliberation and the exposition of the facts and the law to sustain his cause.

Great things are expected when this select personnel

of the House convenes. The results are seldom disappointing and always heartening. Never was the performance of the House more exhilarating than at its meeting in Chicago last February.

We venture the assertion, without fear of contradiction, that at the morning session of the House on February 26, under the skilful guidance of its distinguished Chairman, heights were reached in debate never surpassed and seldom equalled in the story of our House of Delegates.

The discussion related to the subject matter of the report of the Committee on Peace and Law through United Nations and the first two of its recommendations.

The first proposed an amendment to the Constitution to prevent a treaty from overriding any part of the Constitution, or automatically overriding state laws, merely by virtue of approval by the President and two-thirds of the Senators present; and to prevent Congress from ratifying a treaty extending federal power into fields in which Congress has no power to legislate except under the authority of that treaty. The Section of International and Comparative Law opposed the proposed amendment.

The important thing for the purpose of this statement is not how the House voted but the manner in which arguments were presented. The participants showed the results of careful and thorough study in what they said. They maintained themselves with quiet, earnest dignity. They spoke temperately, yet with calm forcefulness and assurance.

The issues were not as simple as they seemed. The exercise of the treaty-making power itself involves problems the solution of which is frequently not without difficulty.

John W. Davis, while Ambassador at the Court of St. James, spoke upon this subject before the Oxford University British American Club. His speech was published as the leading article in the September, 1920, issue of the AMERICAN BAR ASSOCIATION JOURNAL.

Referring to the President and the Senate, Mr. Davis said:

"Like all other officers of the Government they dare not exceed the authority which has been granted to them, and a treaty no less than a statute must conform to the Constitution and yield to its superior force. No treaty, by way of illustration, would have binding force which violated the Constitutional prohibition against the establishment of religion. . . . Of more practical consequence is the query whether by the use of the treaty-making power the Federal Government can deal with any of those matters left by the Constitution to the control of the states; matters of public morals, public health, the hours of labor, or, as in the case of our most recent treaty with Great Britain, the protection of the wild fowl that come and go across the Canadian border. Here there is a fierce battle among the pundits. You will think it strange that after the Constitution of the United States has been in force for 140 years such questions should still be open. I can only reply that there are many more equally unsettled, and as to all of them we wait for a deliverance in the fullness of time from the Supreme Court as the final arbiter and interpreter."

The second resolution offered by the Committee suggested that no action be taken presently upon the proposal for the establishment of an International Criminal Court. The Section of Criminal Law joined with the Section of International Law in challenging the position of the Committee. Again the debate and the presentation of arguments on all sides of the question were of the highest quality.

Other matters coming before the House were given careful and serious consideration and discussed dispassionately and exhaustively.

All these debates were summarized in the May issue of the JOURNAL.

All in all that Mid-Year Meeting of the House was memorable,—not soon to be forgotten.

**Louisville Regional Meeting**

*(Continued from page 487)*

Lexington Country Club where the Lexington Bar Association tendered a cocktail party and a buffet luncheon. Following this, some went to the Keeneland Race Course and some to visit the horse and stock farms and to attend a party at the Crown Crest Farm on the Newton Pike. All met again at the Keeneland Race Course to see the running of the Ashland Stakes and the presentation by President Barkdull of a trophy to the winner.

This meeting was made possible by the efforts of Blakey Helm, its Director, and by the work of the American Bar Association Regional Meeting Committee comprising Burt J. Thompson, of Forest City, Iowa, its Chairman; E. Smythe Gambrell, of Atlanta; Charles S. Rhyne, of Washington, D.C.; Robert G. Storey, of Dallas; and Richard P. Tinkham, of Hammond, Indiana, backed up by the effective work of the Louisville and Kentucky State Bar Associations and by the complete co-operation of the Presidents of the participating state, metropolitan and local bar associations in the six states. Its greatest success lay in the unique charm of Kentucky and its lawyers who spared nothing in living up completely to their famous tradition of hospitality and friendliness.

# Review of Recent Supreme Court Decisions

George Rossman
Editor-in-Charge

## CONFLICT OF LAWS

### Question of Whether Obligation To Pay Alimony Is Terminated by a Remarriage Later Annulled by Decree of Sister State Is To Be Determined by Law of State Awarding Alimony Decree

■ *Sutton* v. *Leib*, 342 U. S. 402, 96 L. ed. Adv. Ops. 352, 72 S. Ct. 398, 20 U. S. Law Week 4156. (No. 143, decided March 3, 1952.)

In 1939, petitioner Sutton divorced the respondent in Illinois and was awarded monthly alimony of $185 "for so long as plaintiff shall remain unmarried, or for so long as this decree remains in full force and effect". In 1944, petitioner married Walter Henzel in Nevada immediately after a Nevada court had awarded him a decree of divorce from his wife Dorothy, a resident of New York who made no appearance in the Nevada proceedings. Dorothy Henzel thereupon brought a separate maintenance action in New York in which Henzel appeared. The New York proceeding resulted in a decree in favor of Dorothy Henzel which declared Henzel's Nevada divorce from her "null and void". Both petitioner and Henzel appeared in annulment proceedings in New York which ended in a decree annulling their marriage on the ground that it was bigamous. Petitioner brought this action in a federal district court in Illinois, alleging diversity jurisdiction, to obtain alimony payments from her first husband for the period from the Nevada remarriage to the date of her third presumably valid marriage in New York to a third man. Respondent argued that the Nevada marriage ended his obligation to pay alimony under the terms of the Illinois decree. Petitioner contended that Illinois was obliged to give full faith and credit to the New York decree, arguing that since it voided the Nevada marriage *ab initio*, respondent was still liable for alimony until her marriage to her present husband. The district court rendered summary judgment for respondent, and the Court of Appeals for the Seventh Circuit affirmed, holding that the Nevada marriage was valid in Nevada, that it was entitled to full faith and credit in Illinois and that the liability for alimony had been terminated.

The Supreme Court, speaking through Mr. Justice REED, reversed and remanded for a determination whether Illinois law gave the Nevada marriage, subsequently annulled by New York, sufficient vitality to release Leib from his obligation to pay alimony. He noted that New York had had jurisdiction of the parties and that its decree annulling the Nevada marriage was entitled to full faith and credit. The Court of Appeals erred in holding that the Nevada decree was entitled to full faith and credit, he said, for it was subject to attack and nullification in New York since Mrs. Henzel was not personally served in Nevada and did not appear in those proceedings. Illinois is required to give full faith and credit to the New York decree of annulment, he reasoned, but Illinois is free to decide for itself what effect that annulment has on the obligations of the respondent, who was a stranger to it.

It was noted that Mr. Justice BLACK would have affirmed the judgment of the Court of Appeals.

Mr. Justice FRANKFURTER wrote a concurring opinion, declaring that he would remand the case to the Court of Appeals to be held by it until the petitioner obtained a decision by the Illinois Supreme Court of the Illinois law on the remaining question. He declared that, since Illinois law on the point had not been determined by the Illinois court, the Court of Appeals could give only a "tentative and indecisive" answer to the problem.

The case was submitted upon briefs by John Alan Appleman and Edward D. Bolton for the petitioner, and by Arthur M. Fitzgerald for the respondent.

## CONSTITUTIONAL LAW

### New York's Feinberg Law Disqualifying Teachers Who Belong to Subversive Organization Held Not To Violate Freedom of Speech, Assembly or Due Process

■ *Adler* v. *Board of Education of the City of New York*, 342 U. S. 485, 96 L. ed. Adv. Ops. 295, 72 S. Ct. 380, 20 U. S. Law Week 4127. (No. 8, decided March 3, 1952.)

This was an action for a declaratory judgment begun in the Supreme Court of New York, Kings County, praying that New York's Feinberg Law be declared unconstitutional. The preamble to the law sets forth legislative findings that Communists are infiltrating the public school system as teachers, using their positions to advocate and teach Communist doctrine. The law provides that school boards make a list, after full notice and hearing, of organizations that advocate, advise, teach or embrace the violent overthrow of the Government and enacts that membership in such organizations "shall constitute prima facie evidence for disqualification for appointment to or retention in any office or position in the school system". The statute provides for a full hearing with the

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right to judicial review before an employee or seeker of employment is discharged or denied employment.

On motion for judgment on the pleadings, the New York Supreme Court held that the statute violated the due process clause of the Fourteenth Amendment and issued an injunction. The Appellate Division reversed and the New York Court of Appeals affirmed the judgment of the Appellate Division.

On appeal to the United States Supreme Court, the Court affirmed, speaking through Mr. Justice MINTON. In reply to the argument that the Feinberg Law and the rules promulgated under it by the Board of Education are an abridgment of free speech and assembly, the Court declared that, while teachers in New York have the right to assemble, speak and believe as they choose, they have no right to work for the state on their own terms. He held that there was nothing in the statute that deprived them of freedom of speech or assembly. The school board has the right and the duty of screening the teachers to determine their fitness, he continued, and if a person is found to be unfit "because of membership in a listed organization, he is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system might be limited, but . . . .[c]ertainly such limitation is not one the state may not make in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence".

It had also been argued that the provision making membership in any of the listed organizations prima facie evidence of disqualification to teach was itself a denial of due process because the fact found bore no resemblance to the fact presumed. In reply to this, Mr. Justice MINTON said that membership in one of the listed organizations found to be within the statute and known by the member to be within the statute was a legislative finding that the member supported the thing the organization stood for, that is, the violent overthrow of the Government. "We cannot say that such a finding is contrary to fact or that 'generality of experience' points to a different conclusion", he declared, adding that there was no problem of procedural due process because the presumption was not conclusive and the person against whom it was applied had full opportunity to rebut it. "Where, as here, the relation between the fact found and the presumption is clear and direct and is not conclusive, the requirements of due process are satisfied", he concluded.

The issue of unconstitutional vagueness of the statutory language had been raised for the first time in argument before the Court. Mr. Justice MINTON disposed of this question by citing the rule that the Court does not pass upon the constitutionality of a state statute before the state courts have had an opportunity to do so.

Mr. Justice BLACK wrote a dissenting opinion, declaring that in his view, under the First Amendment made applicable to the states by the Fourteenth, "public officials cannot be constitutionally vested with powers to select the ideas people can think about, censor the public views they can express, or choose the persons or groups people can associate with."

Mr. Justice FRANKFURTER wrote an opinion dissenting on the ground that the Court was being asked to adjudicate claims against the constitutionality of a statute before it had been put into operation in a case in which the parties had no real interest, nothing really at stake. In his view, the Court should have declined jurisdiction.

Mr. Justice DOUGLAS, joined by Mr. Justice BLACK, wrote a dissenting opinion in which he declared that he could not accept the doctrine that a citizen who enters the public service can be forced to sacrifice his rights. He termed the Feinberg Act "guilt by association" and declared that it was certain to raise havoc with academic freedom.

The case was argued by Osmond K. Fraenkel for appellants, and by Michael A. Castaldi for the Board of Education.

## CONSTITUTIONAL LAW

### State Statute Prohibiting Docking of Workers for Time Spent in Voting Held Not To Deny Due Process

■ *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 96 L. ed. Adv. Ops. 343, 72 S. Ct. 405, 20 U. S. Law Week 4152. (No. 317, decided March 3, 1952.)

A Missouri statute provides that an employee may absent himself from his employment for four hours between the opening and closing of the polls without penalty on an election day. An employer who, among other things, deducts wages for that absence is deemed to be guilty of a misdemeanor. On November 5, 1946, an election day, appellant allowed its employees to leave early so as to give them the required four consecutive hours off prior to the closing of the polls, but did not pay them for the time they took from their regular working hours. It was convicted and fined for violation of the statute. The Missouri Supreme Court affirmed over objections that the statute violated the due process and equal protection clauses of the Fourteenth Amendment.

Speaking through Mr. Justice DOUGLAS, the Supreme Court reversed. The opinion compared the liberty of contract argument advanced by appellant to the philosophy of earlier Supreme Court decisions invalidating state statutes prescribing maximum working hours, outlawing "yellow dog" contracts and fixing minimum wage standards for women. The "only semblance of substance" in the objection to the statute, Mr. Justice DOUGLAS said, was that it required the employer to pay wages for a period in which the employee performed no services. Of this, he said, "Most regulations of business necessarily impose financial burdens on the enterprise for which no compensation is paid." He concluded that the legislative determina-

tion that time out for voting should cost the employee nothing, was a valid one under the "broad and inclusive concept" of the police power.

It was noted that Mr. Justice FRANKFURTER concurred in the result.

Mr. Justice JACKSON wrote a dissenting opinion in which he pointed out that the employee who had instigated the suit had demanded a four-hour leave of absence with full pay to do election campaigning and get out the vote. He lived 200 feet from the polling place and it took him five minutes to vote. Mr. Justice JACKSON thought that the Court's resort to the analogy of the minimum wage laws was "far fetched and unconvincing" and declared that it confused the point in issue to hold that because a state may require payment of a minimum wage for hours that are worked, it may compel payment for time that is not worked.

The case was argued by Henry C. M. Lamkin for appellant, and by John R. Baty for Missouri.

## CONSTITUTIONAL LAW

### Parent Taxpayer Held To Have No Standing To Contest Validity of State Statute Requiring Reading of Bible in Public Schools

■ *Doremus* v. *Board of Education of Borough of Hawthorne,* 342 U. S. 429, 96 L. ed. Adv. Ops. 310, 72 S. Ct. 394, 20 U. S. Law Week 4150. (No. 9, decided March 3, 1952.)

This was an action for a declaratory judgment prosecuted in the state courts of New Jersey, seeking to have declared invalid a New Jersey statute that requires the reading, without comment, of five verses of the Old Testament at the opening of each public-school day. It was alleged that the act violated the establishment of religion clause of the First Amendment. The state trial court denied relief on the merits on the basis of the pleadings and a pretrial conference. The New Jersey Supreme Court rendered its opinion that the statute did not violate the Federal Constitution, disposing of the case on its merits despite its doubt as to jurisdiction since the only interest one of the complainants had was as a "citizen and taxpayer" and the other, while a parent of a girl in the public schools, did not allege any violation of rights.

The Supreme Court of the United States dismissed an appeal to it without reaching the constitutional question. Mr. Justice JACKSON, speaking for the Court, said that the interests of a taxpayer are too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over the manner of tax expenditure. He declared: "We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of 'case or controversy', we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such."

Mr. Justice DOUGLAS, joined by Mr. Justice REED and Mr. Justice BURTON, wrote an opinion dissenting on the ground that the case should be decided on its merits. A suit by all the taxpayers to enjoin the practice authorized by the school board would be a suit by vital parties, he declared, and he said that he could see no reason why less than all could not bring such a suit, since their interest was the same.

The case was argued by Heyman Zimel for Doremus, and by Theodore D. Parsons and Harry F. Schenk for the Board of Education.

## CONTRIBUTION

### No Right of Contribution Exists Between Two Maritime Joint Tortfeasors in Federal Noncollision Cases

■ *Halcyon Lines and Vinke and Company* v. *Haenn Ship Ceiling and Refitting Corporation, Haenn Ship Ceiling and Refitting Corporation* v. *Halcyon Lines and Vinke and Company,* 342 U.S. 282, 96 L. ed. Adv. Ops. 217, 72 S. Ct. 277, 20 U.S. Law Week 4094. (Nos. 62 and 197, decided January 14, 1952.)

Halcyon Lines hired the Haenn Ship Ceiling and Refitting Corporation to make repairs on Halcyon's ship which was moored in navigable waters. One Baccile, an employee of Haenn, was injured while making these repairs and brought suit for damages against Halcyon, alleging that his injuries were caused by its negligence and the unseaworthiness of its vessel. Halcyon joined Haenn as a party defendant on the ground that its negligence had contributed to the injuries. By agreement, Baccile was awarded a judgment of $65,000, paid by Halcyon. The jury returned a special verdict finding Haenn 75 per cent and Halcyon 25 per cent responsible, but the district judge refused to accept this verdict and entered his judgment holding each joint tortfeasor responsible for half the damage. The Court of Appeals for the Third Circuit held that the amount of Haenn's contribution could not exceed the amount Haenn would have been compelled to pay under the Longshoremen's and Harbor Workers' Compensation Act.

The Supreme Court reversed the judgments of the Court of Appeals and remanded the causes to the District Court with instructions to dismiss the contribution proceeding against Haenn. The opinion of the Court was delivered by Mr. Justice BLACK, who rested his decision upon a conclusion that it would be unwise for the Court to attempt to fashion any new judicial rules of contribution between joint tortfeasors. "We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups" he declared. While the admiralty rule is that mutual wrongdoers share equally the damage sustained when two vessels collide, Mr. Justice BLACK found that the Court had never applied the rule to noncollision cases and that, while the Congress has enacted much legislation in the area of maritime personal injuries, the present case is not covered

by the statutes. "In view of the foregoing, and because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so" he declared.

It was noted that Mr. Justice REED and Mr. Justice BURTON would have reversed with directions to the district court to allow the contributions equal to 50 per cent of the judgment recovered by Baccile against Halcyon.

The cases were argued by Joseph W. Henderson for Halcyon, and by Thomas E. Bryne Jr., for Haenn.

## EXPLOSIONS AND EXPLOSIVES

### ICC Regulation Requiring Motor Vehicles Loaded with Explosives To Avoid Crowded Thoroughfares Held Valid Over Allegations of Invalidity for Vagueness

■ *Boyce Motor Lines, Inc.* v. *United States,* 342 U. S. 337, 96 L. ed. Adv. Ops. 249, 72 S. Ct. 329, 20 U. S. Law Week 4099. (No. 167, decided January 28, 1952.)

Petitioner was indicted for violation of a regulation promulgated by the Interstate Commerce Commission providing that "Drivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed gas, or poisonous gas shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." The indictment charged that petitioner had thrice sent one of its trucks carrying carbon bisulphide through the Holland Tunnel and that on the third of these trips the load exploded in the Tunnel, injuring about sixty persons. The District Court dismissed the indictment, holding that the words "so far as practicable, and, where feasible" in the regulation were "so vague and indefinite as to make the standard of guilt conjectural". The Court of Appeals for the Third Circuit reversed, holding that the regulation established a reasonably certain standard of conduct.

The Supreme Court affirmed in an opinion delivered by Mr. Justice CLARK. He pointed out that, under the regulations, the Government must prove that petitioner could have taken another route that was both commercially practicable and appreciably safer than the one followed, and must also show that petitioner knew that there was such a practicable, safer route and yet deliberately took the more dangerous or that it willfully neglected to inquire into the availability of such an alternative route. "If it is true that in the congestion surrounding the lower Hudson there was no practicable way of crossing the River which would have avoided such points of danger to a substantially greater extent than the route taken, the petitioner has not violated the Regulation. But that is plainly a matter for proof at the trial," Mr. Justice CLARK declared.

Mr. Justice JACKSON wrote a dissenting opinion in which Mr. Justice BLACK and Mr. Justice FRANKFURTER joined. The dissenters declared that the regulation contained no definite standard from which one can start at the calculation of his duty. "It leaves all routes equally open and all equally closed" Mr. Justice JACKSON said. "What guidance can be gleaned from this regulation as to how one could with reasonable certainty make a choice of routes that would comply with its requirements?"

The case was argued by Archie O. Dowson for the petitioner, and by Robert W. Ginnane for the United States.

## MONOPOLIES

### Amendment by District Court of Consent Decree So as To Require Sale of Defendant Stockholder's Stock Held To Require Hearing

■ *Hughes* v. *United States,* 342 U.S. 352, 96 L. ed. Adv. Ops. 281, 72 S. Ct. 306, 20 U.S. Law Week 4118. (No. 86, decided February 4, 1952.)

In antitrust proceedings filed against Radio-Keith Orpheum Corporation and other moving picture producers, a consent decree was entered containing detailed provisions for complete divorcement of R.K.O.'s production-distribution assets from its theatre assets. Two new companies were to be formed, one to take over the production and distribution subsidiaries and the other to own and control the theatres. R.K.O. itself was to be dissolved and its former stockholders were to become the owners of all the capital stock of the two new companies. Appellant Hughes owned 24 per cent of R.K.O's common stock; no other shareholder owned as much as 1 per cent. Hughes and the Government agreed on terms to meet this situation, it being provided in the consent decree that Hughes might "either" (1) sell his stock in one or the other of the two newly formed companies "or" (2) deposit his stock with a court-designated trustee under a voting trust agreement to remain in force until Hughes should have sold his stock in one of the companies. Hughes chose not to sell any of the stock, he and the Government agreed upon a trustee and the terms of a voting trust, and the agreement was approved by a court order. This controversy arose when the Government sought a court order forcing the trustee to sell the stock. Without evidence or findings of fact, the District Court amended its order appointing a trustee by providing that "if the stock trusteed shall not have been disposed of by Howard R. Hughes by February 20, 1953, the trustee shall dispose of such stock within two years thereafter".

The Supreme Court reversed in an opinion delivered by Mr. Justice BLACK. He held that the District Court erred in reading the agreement between Hughes and the Government as compelling him to sell his stock within a reasonable time. "A reading of the either/or wording would make most persons believe that Hughes was to have a choice of two different alternatives. Hughes would have no choice if the first

'alternative' was to sell the stock and the second 'alternative' was also to sell the stock" he remarked. "Whatever justification there may be now or hereafter for new terms that require a sales of Hughes' stock, we think there is no fair support for reading that requirement into the language of [the agreement]." He rejected the contention of the Government that the District Court could summarily order sale of the stock under provisions of the decree, which reserved jurisdiction to amend, or through the exercise of its inherent equity powers.

Mr. Justice JACKSON and Mr. Justice CLARK took no part in the consideration or decision of the case.

The case was argued by T. A. Slack for Hughes, and by Philip Marcus for the Government.

## PROCESS

### Federal Due Process Neither Prohibits Nor Requires State Court To Entertain Suit Against Foreign Corporation for Claim Not Arising Out of Business Transacted in State

■ *Perkins* v. *Benguet Consolidated Mining Company*, 342 U.S. 437, 96 L. ed. Adv. Ops. 335, 72 S. Ct. 413, 20 U.S. Law Week 4146. (No. 85, decided March 3, 1952.)

The Benguet Consolidated Mining Company is a corporation organized under the laws of the Philippine Islands, where it owns and operates profitable gold and silver mines. Petitioner, a nonresident of Ohio, filed two actions *in personam* in an Ohio court against the corporation, among others, seeking dividends allegedly due her as a shareholder and asking damages for the company's alleged failure to issue her certain stock certificates. Service was made upon the mining company's president who was carrying on a limited part of the corporation's business in Ohio. The cause of action sued upon did not arise in Ohio and did not relate to the corporation's activities there. The trial court sustained a motion to quash the service of summons upon the mining company and the state Court of Appeals and the Ohio Supreme Court affirmed.

On writ of certiorari before the United States Supreme Court, Mr. Justice BURTON, speaking for the Court, held that the due process clause of the Fourteenth Amendment left Ohio free to take or to decline jurisdiction over the corporation. He found that it was not clear from the opinion of the Ohio Supreme Court whether it had rested its holding upon state grounds or upon the Fourteenth Amendment. There was no substance in the suggestion that federal due process required Ohio to grant such relief against a foreign corporation, he said, and, in holding that nothing in the Federal Constitution prohibited Ohio from opening her courts to such a case, he stated the following rule: "Today if an authorized representative of a foreign corporation be physically present in the state of the forum and be there engaged in activities appropriate to accepting service or receiving notice on its behalf, we recognize that there is no unfairness in subjecting that corporation to the jurisdiction of the courts of that state through such service of process upon that representative." He noted that in this case, the president of the mining company had carried on correspondence, banking, stock transfers, payment of salaries and purchase of machinery in Ohio. He declared that those activities were enough to make it fair and reasonable to subject the corporation to *in personam* proceedings in the state "at least insofar as the proceedings *in personam* seek to enforce causes of action relating to those very activities or to other activities of the corporation within the state". It is but one step further to a proceeding *in personam* to enforce a cause of action not arising out of the corporation's activities in the state of the forum, he declared, and certainly the activities of the corporation within Ohio were sufficiently substantial to permit that state to entertain the cause of action.

Mr. Justice BLACK concurred in the result.

Mr. Justice MINTON wrote a dissenting opinion in which the CHIEF JUSTICE joined. He said that he would dismiss the writ as improvidently granted because the Ohio Supreme Court had rested its opinion upon adequate state grounds.

The case was argued by Robert N. Gorman for Perkins, and by Lucien H. Mercier for Benguet Consolidated Mining Company.

## RAILROADS

### State Courts Must Follow Federal Rule as to Function of Judge and Jury in Applying Federal Employers Liability Act

■ *Dice* v. *The Akron, Canton and Youngstown Railroad Company*, 342 U.S. 359, 96 L. ed. Adv. Ops. 285, 72 S. Ct. 312, 20 U.S. Law Week 4120. (No. 374, decided February 4, 1952.)

Dice, an employee of the Akron, Canton and Youngstown Railroad, was injured when an engine in which he was riding jumped the track. He brought suit for damages under the Federal Employers' Liability Act in an Ohio court, alleging that his injuries were the result of respondent's negligence. Respondent denied the allegation of negligence and pleaded a release signed by petitioner as a bar to recovery. Petitioner contended that the release was void because he had signed it relying upon respondent's deliberately false statement that it was nothing more than a receipt for back wages. After a jury trial in which petitioner won a verdict for $25,000, the trial judge entered judgment for respondent notwithstanding the verdict, holding that the facts did not "sustain either in law or in equity the allegations of fraud. . . ." A state appellate court reversed on the ground that under federal law, which controlled in its view, the jury's verdict must stand because there was ample evidence to support its finding of fraud. The Ohio Supreme Court reversed, one judge dissenting, holding that Ohio, not federal, law governed, that peti-

tioner was bound by the release, and that under state law factual issues as to fraud in the execution of the release were properly decided by the judge rather than by the jury.

The Supreme Court of the United States reversed, sustaining the state court of appeals, Mr. Justice BLACK speaking for the Court. Holding that the validity of releases under the Act was a question to be determined by federal, not state, law he declared that "Manifestly the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act."

The Ohio rule, which bound the petitioner by the release in this case, is out of harmony with modern judicial and legislative practice to relieve injured persons from the effect of releases fraudulently obtained, he said. He announced that the correct federal rule was that a release of rights under the Act "is void when the employee is induced to sign it by the deliberately false and material statements of the railroad's authorized representatives made to deceive the employee as to the contents of the release."

The right to trial by jury is "part and parcel of the remedy afforded railroad workers under the Employers Liability Act" Mr. Justice BLACK declared, and is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere "local rule of procedure".

Mr. Justice FRANKFURTER, joined by Mr. Justice REED, Mr. Justice JACKSON and Mr. Justice BURTON, wrote an opinion concurring for reversal but dissenting from the Court's opinion. The dissenting Justices held that the states are under no duty to treat actions arising under the Act differently from the way they treat local negligence actions, including the distribution of the functions of judge and jury. They felt, however, that the Ohio courts erred in applying the state rule as to the validity of releases rather than the federal rule.

The case was argued by Rice A. Hershey for the petitioner, and by William A. Kelly for the respondent.

## STATES

### Full Faith and Credit Clause Requires State Courts To Entertain Action for Wrongful Death Resulting from Accident That Occurred in Sister State

■ *First National Bank of Chicago* v. *United Air Lines, Inc.*, 342 U.S. 396, 96 L. ed. Adv. Ops. 360, 72 S. Ct. 421, 20 U.S. Law Week 4160. (No. 349, decided March 3, 1952.)

John Louis Nelson was killed when one of respondent's air liners crashed in Utah. Petitioner, Nelson's executor, brought this action in a United States District Court in Illinois claiming $200,000 under the Utah wrongful death statute. The decedent was a resident of Illinois; petitioner is an Illinois bank; respondent is a Delaware corporation doing business in Illinois. An Illinois statute provides that "no action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place." The District Court, relying upon the doctrine of *Erie* v. *Tompkins*, 304 U.S. 64, held that in diversity cases this statute was binding upon the federal as well as the state courts in Illinois and that it barred this action. The Court of Appeals affirmed.

Speaking for the Court, Mr. Justice BLACK reversed, holding that the Illinois statute violated the full faith and credit clause on the doctrine of *Hughes* v. *Fetter*, 341 U.S. 609, decided last term. The *Hughes* case involved a Wisconsin statute similar to the Illinois enactment at issue here. Mr. Justice BLACK noted that the only difference between the two statutes is that Illinois permits suits in its courts under another state's wrongful death statute if service of process cannot be had on the defendant in the state where the death was brought about. "That Illinois is willing for its courts to try some out-of-state death actions is no reason for its refusal to grant full faith and credit as to others", he declared.

Mr. Justice JACKSON, joined by Mr. Justice MINTON, wrote a dissenting opinion. In his view, the District Court should have applied the substantive law of Utah. He did not regard the Illinois jurisdictional rule as binding on the federal court which, he said, derived its jurisdiction of the case from federal law.

Mr. Justice REED dissented on the ground that *Hughes* v. *Fetter* should not be extended to compel a state to entertain an action for wrongful death if the claim could be effectively litigated in the courts of the state where the cause of action arose.

The case was argued by Robert J. Burdett for First National and by David Jacker for United Air Lines.

## STATES

### Suit To Enjoin Collection by State Officer of Taxes Allegedly in Violation of the Federal Constitution Held Not Barred by Doctrine of Sovereign Immunity

■ *Georgia Railroad and Banking Company* v. *Redwine*, 342 U.S. 299, 96 L. ed. Adv. Ops. 255, 72 S. Ct. 321, 20 U.S. Law Week 4108. (No. 1, decided January 28, 1952.)

This was an action filed in the district court to enjoin appellee, the Georgia State Revenue Commissioner, from assessing or collecting ad valorem taxes and to have the threatened collection adjudged in violation of a prior decree also entered by the court below and affirmed by the United States Supreme Court. Appellant, a Georgia corporation, was incorporated in 1833 by a special act of the Georgia General Assembly that included a provision exempting it from taxation. In 1945, the Georgia Constitution was amended to provide that "all exemptions from taxation heretofore granted in corporate charters are declared to be

henceforth null and void". Pursuant to this amendment, appellee was proceeding against appellant for the collection of ad valorem taxes for the year 1939 and all subsequent years on behalf of the state and every county, school district and municipality through which appellant's lines run. The District Court dismissed the complaint for want of jurisdiction, on the ground that it was in effect a suit against the state to which the state had not consented, prohibited by the Eleventh Amendment. Before the Supreme Court of the United States, the state argued that the District Court was without jurisdiction because "plain, speedy and efficient" remedies were available to appellant in the state courts.

The Supreme Court reversed and remanded, speaking through the CHIEF JUSTICE. He found that the Georgia Supreme Court, in an earlier phase of the litigation, had held that injunctive relief was not available to restrain collection of the taxes. In order to arrest tax execution by affidavits of illegality, another state remedy suggested as being available, he found that that procedure would have required the filing of over three hundred separate claims in fourteen different counties to protect the single federal claim asserted. A third suggestion, a suit for refund after payment of the taxes, would have been applicable only to taxes payable directly to the state and amounting to less than 15 per cent of the total amount in controversy. "We cannot say that the remedies suggested by the Attorney General afford appellant the 'plain, speedy and efficient remedy' necessary to deprive the District Court of jurisdiction under 28 U. S. C. (Supp. IV) §1341" the CHIEF JUSTICE declared.

As for the jurisdictional ground upon which the District Court had based its dismissal, the CHIEF JUSTICE found that the action was not against the state, but was rather an attempt to enjoin a state officer from collecting taxes in alleged violation of appellant's rights under the Federal Constitution. Such a suit is not barred as an unconsented suit against the state, he said. "The State is free to carry out its functions without judicial interference directed at the sovereign or its agents, but this immunity from federal jurisdiction does not extend to individuals who act as officers without constitutional authority".

Mr. Justice DOUGLAS, in a concurring opinion, said that in his view the suit was in reality against the state to enjoin an impairment of contract which is forbidden by the commerce clause.

The case was argued by Furman Smith for the company, and by M. H. Blackshear, Jr., for the appellee.

## TAXATION

### Imposition by State of Personal Property Ad Valorem Tax on Oil Barges Registered in the State But Operated Elsewhere Held To Be Prohibited by the Fourteenth Amendment

■ *The Standard Oil Company* v. *Peck,* 342 U.S. 382, 96 L. ed. Adv. Ops. 271, 72 S. Ct. 309, 20 U.S. Law Week 4113. (No. 184, decided February 4, 1952.)

Appellant is an Ohio corporation that owns boats and barges which it uses to transport oil along the Mississippi and Ohio Rivers. The vessels neither pick up nor discharge oil in Ohio, and the maximum river mileage traversed by the boats and barges in any trip through waters bordering Ohio is 17½ miles. The vessels are registered in Cincinnati but stop in Ohio only for occasional fuel or repairs. None of the stops involves loading or unloading cargo. Peck, the Tax Commissioner of Ohio, levied an ad valorem personal property tax on all the vessels and was sustained by the Board of Tax Appeals and the Ohio Supreme Court, over objections that the tax violated the due process clause of the Fourteenth Amendment.

On appeal to the Supreme Court of the United States, Mr. Justice DOUGLAS reversed, noting that the Court's earlier view that the domiciliary state would have a strong claim on the whole of the tax had been rejected in *Ott* v. *Mississippi Barge Line,* 336 U.S. 169. "The formula approved was one which fairly apportioned the tax to the commerce carried on within the state" he said. "In that way we placed inland water transportation on the same constitutional footing as other interstate enterprises." He rejected the contention that the fact that Ohio was the state of domicile gave it power to levy the tax. "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile", he declared. "Otherwise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives these operations."

Mr. Justice BLACK dissented without opinion.

Mr. Justice MINTON wrote a dissenting opinion, declaring that seagoing vessels are taxable at the domicile of the owner and that the only exception to that general rule was where vessels had acquired a situs for taxation in some other state. That was not the case here, he declared.

The case was argued by Isador Grossman and Rufus S. Day, Jr., for appellant, and by Isadore Topper for the appellee.

## UNITED STATES

### Federal Antiassignment Act Bars Assignment of Claims Against the United States in Spite of Mutual Mistake of Law and Joinder of Assignors as Parties Defendant

■ *United States* v. *Shannon,* 342 U. S. 288, 96 L. ed. Adv. Ops. 221, 72 S. Ct. 281, 20 U.S. Law Week 4091. (No. 47, decided January 14, 1952.)

In 1946, Samuel M., Patti A. and W. L. Shannon purchased a tract of land from Mrs. Kathleen Boshamer, part of which had been leased by the United States. During January and February, 1945, United States soldiers had damaged buildings standing on the land. The in-

strument of sale agreed that "after completion of the sale and after delivery of the deed, the sellers hereby release to the purchasers any claim, reparation, or other cause of action against the United States Government for any damage caused the property. . . ." This was an action brought by the purchasers under the Federal Tort Claims Act against the United States for the damage done by the soldiers; Mrs. Boshamer was joined as party defendant in an effort to escape the prohibition of the Antiassignment Act, R.S. § 3477. Respondents admitted that the damage had occurred before the claim had been assigned to them and that they knew of it before the assignment. The District Court held that the Antiassignment Act did not apply, on the ground that the joinder of the assignors prevented any possible prejudice to the Government since the rights of all possible claimants would be finally adjudicated in the suit. The Court of Appeals affirmed, holding that the assignment had resulted from a mutual mistake as to the law: "The relief is given to the assignees, not as a matter of law, but as a matter of equity because of the mistake involved and the hardship which would otherwise result."

The Supreme Court reversed, speaking through Mr. Justice CLARK, who held that the assignment fell within the ban of the Antiassignment Act. Pointing out that the testimony at the trial made it plain that the assignment was a voluntary one, Mr. Justice CLARK declared that the case "presents a situation productive of the very evils which Congress intended to prevent [in passing the Antiassignment Act] . . . . the assignors knew of no damage and refused to bring suit, yet by their assignment the Government is forced to defend this suit through the courts and deal with persons who were strangers to the damage and are seeking to enforce a claim which their assignors have foresworn". To follow the Court of Appeals and make an exception because of the "mutual mistake of law" would require an inquiry into the state of mind of all parties to a challenged assignment and reward those who are ignorant of a statute that has been upon the books for almost a century, he declared. To hold the Act inapplicable because all possible claimants were before the court would draw a distinction on the basis of a fortuitous factor – whether the assignee could get personal service upon his assignor. He gave little weight to the "hardship" found by the Court of Appeals, saying that the Shannons paid $30 an acre for land that was shown to be worth $100.

Mr. Justice BLACK and Mr. Justice JACKSON dissented without opinion.

In a separate opinion, Mr. Justice FRANKFURTER declared that he would have dismissed the writ as improvidently granted.

Mr. Justice DOUGLAS, in a dissenting opinion, declared that only a "narrow conceptual reason" prevented the Shannons from recovering. "Certainly the Boshamers could recover from the United States and if the Assignment were treated as void [as against the United States], any recovery by the Boshamers would in equity belong to the Shannons" he declared.

The case was argued by Roger P. Marquis for the United States, and by John Grimball for the Shannons.

## WAR

### Trading with the Enemy Act Permits Return of Property Vested by Alien Property Custodian to German National Involuntarily Detained in Germany During War

■ *Guessefeldt* v. *McGrath*, 342 U.S. 308, 96 L. ed. Adv. Ops. 237, 72 S. Ct. 338, 20 U.S. Law Week 4102. (No. 204, decided January 28, 1952.)

This was an action brought under Section 9 (a) of the Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. § 1 *et seq.*, to recover property vested by the Alien Property Custodian. Petitioner Guessefeldt was a German citizen who had lived continuously in Hawaii from 1896 to 1938 when he took his family to Germany for a vacation. Unable to secure passage for home when war broke out, he was detained involuntarily in Germany, where, however, he did nothing directly or indirectly to aid the enemy's war effort. The District Court dismissed the complaint on a holding that the petitioner was precluded from recovering by Section 39 of the Act, which provides that "No property . . . of Germany, Japan, or any national of either such country vested in . . . the Government . . . pursuant to the provisions of the Act, shall be returned to former owners thereof. . . ." The Court of Appeals for the District of Columbia Circuit affirmed.

The Supreme Court reversed in an opinion written by Mr. Justice FRANKFURTER. In determining that Guessefeldt was entitled to recover, the opinion reviewed the legislative history of Section 39 at some length. Mr. Justice FRANKFURTER noted that Section 9 (a) of the Act ("Any person not an enemy . . . claiming any interest, right, or title in any money or other property which may have been conveyed . . . to the Alien Property Custodian . . . may institute a suit in equity . . . to establish the interest, right, title, or debt so claimed. . . .") allowed the recovery of nonenemy property seized by the Custodian. Mr. Justice FRANKFURTER held that Guessefeldt was not "resident within" Germany and was thus "not an enemy" within the meaning of Section 9 (a). Guessefeldt retained his American domicile and attempted to leave Germany before the United States entered the war, it was pointed out. That phrase "resident within" enemy territory implies something more that mere physical presence and something less than domicile, he determined.

Mr. Justice FRANKFURTER then turned to the Government's contention that, since Guessefeldt was a "national of Germany" within the meaning of Section 39, his privilege of bringing suit under Section 9 (a) was cut off by Section 39. Finding that this argument was "unpersuasive" in the context of the legislative history of Section 39, he noted

that that Section was passed in 1948 as part of a measure establishing a commission on the problem of compensating American prisoners of war, internees and others who suffered personal injury or property damage at the hands of the enemy during World War II. "Congressional attention was focused on the nature and extent of these claims and methods of adjudicating them" he said. "The issues involved in § 39 were of peripheral concern." He declared that the tenor of the hearings on Section 39 demonstrated no purpose to change the existing scope of Section 9(a) and that the interpretation advanced by the Government would "mark the first departure from what appears to be a heretofore consistent congressional policy". To hold that any national of an enemy country is barred from recovery upon a mere showing of his citizenship would raise debatable constitutional questions. Confiscation is not easily to be assumed, he declared, and, considering that, "a construction that avoids it and is not barred by a fair reading of the legislation is invited".

The CHIEF JUSTICE wrote a dissenting opinion in which he was joined by Mr. Justice REED and Mr. Justice MINTON. The CHIEF JUSTICE stated that he would read Section 39 literally, saying that "The Court applies Section 39 by reading out the term 'national' and inserting the term 'enemy' as defined by Section 2(a). Since it is apparent on the face of the statute that Congress in no wise chose to assimilate these two clearly defined terms, the Court should not."

The case was argued by William W. Barron for the petitioner, and by James D. Hill for the respondent.

## WAR

### Trading with the Enemy Act Authorizes Alien Property Custodian To Seize Obligations Represented by Debentures Despite the Fact That Debentures Themselves Were Held in Foreign Country at the Time of Vesting

■ *Cities Service Company and The Chase National Bank of the City of New York* v. *McGrath*, 342 U.S. 330, 96 L. ed. Adv. Ops. 233, 72 S. Ct. 334, 20 U.S. Law Week 4097. (No. 305, decided January 28, 1952.)

In this case, the Attorney General, as successor to the Alien Property Custodian, sought payment by petitioners of two 5 per cent debentures of the face value of $1000 each, payable to bearer. The Cities Service Company was the obligor on the debentures and the Chase National Bank was the indenture trustee. The obligations represented by the debentures had been vested under the Trading with the Enemy Act upon a finding that they were owned by a resident and national of Germany. Neither of the debentures was in the possession of the respondent, one being in the possession of a New York brokerage house, while the other reportedly was in the hands of the Russians in Berlin. The District Court had granted summary judgment for the petitioners on the ground that the Attorney General had exceeded his authority in vesting the property, holding that the obligations represented by the debentures were inseparable from the certificates themselves, which, so far as known, were outside the country at the time of the vesting. The Court of Appeals reversed and directed summary judgment for the respondent, reasoning that the Act authorized the seizure and enforcement of obligations evidenced by debentures outside the country so long as the obligor was within the United States.

The Supreme Court affirmed in an opinion by Mr. Justice CLARK. He held that the Trading with the Enemy Act "grants the authority to vest obligations evidenced by domestic negotiable bearer debentures even though the debentures themselves are outside the United States". He declared that to apply the fiction that the debentures themselves constitute the debt, and to hold that they were not the proper subject for seizure since they had no situs in the country at the time of the vesting, would provide a sanctuary for enemy investments and defeat the recovery of American securities looted by conquering forces and restrict the exercise of the war powers of the United States. This was not intended by the Congress, he declared.

He agreed with the Court of Appeals, however, that, under the Fifth Amendment, petitioners would have a remedy against the United States should a foreign court hold them liable to a holder in due course of the debentures. "In that event, petitioners will have the right to recoup from the United States, for a taking of their property in violation of the Fifth Amendment, 'just compensation' to the extent of their double liability" he declared. "We agree with the Court of Appeals that only with this assurance against double liability can it fairly be said that the present seizure is not itself an unconstitutional taking of petitioners' property."

Mr. Justice REED, joined by Mr. Justice MINTON, wrote an opinion in which he said that he concurred in the Court's opinion except for its declaration that petitioners would be able to recoup just compensation from the United States should they suffer a judgment effecting a second recovery against them. "Determination that the United States owes such an obligation should await development of the circumstances of a second judgment" he declared.

The case was argued by Timothy N. Pfeiffer for the petitioners, and by George B. Searls for the respondent.

# Courts, Departments and Agencies

**George Rossman** • EDITOR-IN-CHARGE **Maxine M. Sprung** • ASSISTANT

**Banks and Banking . . . antitrust laws . . . holding corporation's ownership of stock in forty-eight commercial banks located in five western states and control of forty-seven of these tends to lessen competition and restrain commerce in violation of §7 of Clayton Act . . . corporation ordered to divest itself of all its stock in the forty-seven banks, but permitted to retain holdings in Bank of America.**

■ *In re Transamerica Corp.*, Board of Governors of the Federal Reserve System, March 27, 1952.

In this proceeding the Board of Governors of the Federal Reserve System, by a vote of three to two, held that a holding corporation's ownership of a controlling interest in the stock of forty-seven commercial banks located in five western states violates § 7 of the Clayton Act, 15 USC § 18. In its "Findings as to the Facts", the Board indicated the basis for its order directing the corporation, Transamerica, to divest itself of its holdings within two years and ninety days. The Board stated that Transamerica was organized in 1928 by A. P. Giannini for the purpose of concentrating, under the control of a single organization, banking operations in the western states. Although a bank itself cannot lawfully engage in interstate branch banking, Transamerica, not being a bank, could extend its operations across state lines. Transamerica contended that its stock purchases in the banks were for investment purposes only. However, the majority of the Board replied that the effect of Transamerica's holding and use of such stock "may be to substantially lessen competition and restrain commerce in commercial banking in the States of California, Oregon, Nevada, Arizona, and Washington and tend to create a monopoly in such line of commerce in said area."

In support of its conclusion, the Board emphasized that commercial banks enjoy a monopoly of the "money-payment and money-creation functions" and dominate the market in short-term business credit in the local area which they serve. There is little competition from distantly located banks, the opinion said, since substantially all persons requiring the services afforded by commercial banks must rely upon those in the local area to which they have ready access. The Board referred to figures indicating that Transamerica-controlled banks in the five states have "approximately 41 per cent of all banking offices, 39 per cent of all bank deposits, 50 per cent of all bank loans, and 46 per cent of all deposit accounts of individuals, partnerships and corporations". Moreover, although administrative authorization is necessary for entry into the banking business, the opinion pointed out that a holding corporation, by purchasing controlling stock interests in established banks, avoids this restriction. As the size and resources of the holding corporation increase, its power to suppress potential competition is enlarged because such size may discourage the establishment of independent competing banks.

However, the Board's order does not require Transamerica to divest itself of its minority holdings in the stock of the Bank of America, the world's largest bank, since "The long and close association of Bank of America in aiding in constructing the Transamerica group, the unity established over the years, the personal associations and relationships among important officials in Transamerica and Bank of America, and similar intangible factors, provide sound reason to believe that even if Transamerica were required to divest itself of the stock it now holds in Bank of America, the existing relationship between Transamerica and Bank of America would continue."

Governor Vardaman dissented because, in his opinion, the record failed to sustain the finding that Transamerica's acquisition of bank stocks may substantially lessen competition or tend to create a monopoly. He also believed that the Hearing Officer "arbitrarily and unfairly discriminated against Transamerica" in the proceedings and "erroneously excluded evidence offered by Transamerica in defense of the Board's charges".

Governor Powell also dissented.

Governors Mills and Robertson took no part in the Board's consideration or decision of the matter.

**Constitutional Law . . . wire tapping . . . taxpayer cannot enjoin New York City's purchase and use of wire tapping equipment despite fact that such activity may violate Federal Communications Act and Fourth Amendment to Federal Constitution.**

■ *Black* v. *Impelliterri et al.*, N.Y. Sup. Ct., N.Y. County, Special Term Part III, March 17, 1952, Corcoran J., 111 N. Y. S. 2d 402.

This action was brought by a taxpayer under § 51 of the New York General Municipal Law to enjoin defendants, officers of New York City, from wasting the city's funds by purchasing and using wire tapping equipment. The complaint admitted that defendants' activity is authorized by § 12, Article 1 of the New York Constitution and § 813-a of the Code of Criminal Procedure, but plaintiff taxpayer argued that these provisions conflict with § 605 of

the Federal Communications Act of 1934, Title 47, USC, and the Fourth Amendment to the Federal Constitution.

Granting defendants' motion to dismiss, the Court ruled that wire tapping by local law enforcement officials could not be considered an "illegal official act" or a "factual waste of public funds" so that their action could be enjoined under the General Municipal Law. Justice Corcoran commented that it is the constitutional and legislative policy of the state to permit police officials or district attorneys to tap telephone wires. He said that every attack upon that policy has been rejected by the New York Court of Appeals. In addition, the opinion noted that despite the fact that such activities may be forbidden by federal law, there is no waste of public funds since wire tapping aids in the apprehension and prosecution of criminals.

As for plaintiff's contention that the Fourth Amendment is being violated, the court said that state officials are not governed by that amendment. Its opinion emphasized that "Section 12 of Article I of the State Constitution is our basic law on searches and seizures, and our courts are not bound by decisions of the United States Supreme Court on the effect of illegal searches and seizures."

**Constitutional Law . . . restrictive covenants . . . damage action for breach of racial real property restrictive covenant may not be maintained in state court.**

■ *Phillips et ux.* v. *Naff et ux.*, Mich. Sup. Ct., March 6, 1952, Carr, J., 52 N. W. 2d 158.

Plaintiffs sued to recover damages for an alleged breach of a racial real property restrictive covenant. The trial court granted defendants' motion to dismiss on the ground that the action constituted an attempt to enforce indirectly the covenant and, in practical effect, was repugnant to the Fourteenth Amendment to the Constitution as construed by the Supreme Court in *Shelley* v. *Kraemer*, 334 U.S. 1.

On appeal, the Court affirmed. Plaintiffs contended that an action for damages is one involving individual conduct solely, and the *Shelley* case, which only involved injunctive relief, did not declare such covenants invalid between the parties so long as their purposes were achieved by "voluntary adherence" to their terms. Plaintiffs relied on the Missouri Supreme Court's decision in *Weiss* v. *Leaon*, 225 S.W. 2d 127, where a count for damages was sustained, but the Court replied that awarding damages for breach of a racial restrictive covenant would constitute an indirect method of state enforcement. It observed that "if a sale of property subject to a reciprocal racial covenant cannot be made without rendering the grantor liable to suits for damages, such fact, it may be assumed, would operate to inhibit freedom of purchase by those against whom the discrimination is directed, and also to place a burden on the right of an owner to sell to a purchaser of his own selection. We think the reasons on which the decision of the United States Supreme Court in *Shelley* v. *Kraemer* was based operate in bar of an indirect method of enforcement, and are sufficiently broad in scope as to cover the rights of those affected in the instant controversy."

**Contracts . . . underwriting contract held unenforceable . . . prospectus for stock issue containing untrue statement of earnings breached automobile manufacturers' contract with underwriters and violated Securities Act of 1933.**

■ *Kaiser-Frazer Corp.* v. *Otis & Co.*, C.A. 2d, April 7, 1952, Hand, A.N., C.J.

The Court of Appeals in this case reversed the judgment of the District Court (37 A.B.A.J. 689; September, 1951) which had awarded $3,120,743.51 damages to Kaiser-Frazer Corporation, an automobile manufacturer, for breach of an underwriting contract it had with Otis & Company, a securities underwriter. Kaiser-Frazer had entered into a contract for the sale of 900,000 shares of its unissued common stock at $11.50 a share to Otis & Company who, in turn, was to offer the stock for sale to the public at $13.00 a share. However, on the closing date of the contract, Otis & Company rejected the proffered stock on the ground that a suit to enjoin the pending stock issue had been instituted by one of Kaiser-Frazer's stockholders and also, because Kaiser-Frazer's prospectus contained false and misleading statements.

On appeal, the Court ruled that the contract was unenforceable because the prospectus, which had been filed with the Securities and Exchange Commission, contained a misrepresentation of Kaiser-Frazer's earnings for the month of December, 1947. Judge Hand, writing the Court's unanimous opinion, said that in the early part of 1948, when the stock issue was contemplated, Kaiser-Frazer was still a "newcomer in the automobile industry" and the venture was highly speculative. He believed that under such circumstances prospective purchasers of the stock would rely heavily on the corporation's earnings during the last quarter of 1947 as the best indication of its ability to compete with established manufacturers. However, in its table summarizing earnings, Kaiser-Frazer had stated its earnings in such a way as to represent that it had made a profit of about four million dollars in December, 1947, whereas in reality its earnings were closer to $900,000. Kaiser-Frazer had contended that Otis & Company had full knowledge of all the facts prior to the time it entered into the underwriting agreement and that it could not now rely on such facts as constituting a breach of warranty. To this argument Judge Hand replied that "whatever the rules of estoppel or waiver may be in the case of an ordinary contract of sale, nevertheless it is clear that a contract which violates the laws of the United States and contravenes the public policy as expressed in those laws is unenforceable". Although

the stock was to be sold only to the underwriters and was not a public sale, which would violate the Securities Act of 1933, such sale, the Court stated, "was but the initial step in the public offering of the securities which would necessarily follow. The prospectus, which has been found to have been misleading, formed an integral part of the contract and the public sale of the stock by the underwriter was to be made and could only have been made in reliance on that prospectus. . . . We therefore conclude that the contract was unenforceable and that Kaiser-Frazer was not entitled to recover damages for Otis' breach thereof."

**Federal Communications Commission . . . television . . . "freeze" on construction of new television stations lifted . . . FCC adopts new national assignment plan, provides channels for use by educational stations, prescribes station requirements, fixes July 1, 1952, as date it will begin processing applications for new stations and establishes priorities for cities having no television service and cities where only UHF channels are assigned.**

■ The Federal Communications Commission announced April 14, 1952, that it had completed its Sixth Report and Order which, in effect, lifts the "freeze" on the authorization and construction of new television stations instituted September 30, 1948. Seventy ultra high frequency (UHF) channels are assigned in addition to the twelve very high frequency (VHF) channels now in use. A new nationwide table of television assignments is promulgated which will make available 2,053 assignments in 1291 communities, supplanting the old VHF assignment table which made available only about 400 channels in 140 metropolitan areas. Channel assignments in 242 communities for noncommercial educational use are also made. July 1, 1952, is fixed as the date processing of applications for new stations will begin and cities having no television service and cities where only UHF channels are assigned will be given priority.

The Commission adopted this sixth and concluding report in the television proceedings in Dockets 8736 *et al.* with Commissioner Webster concurring in a separate opinion, Commissioner Jones issuing a dissenting opinion, Commissioner Hennock concurring in part and dissenting in part in separate views and Commissioner Bartley not participating. The complete report was published in the *Federal Register* of May 2, 1952 (17 Fed. Reg. 3905). Reprints will be sold by the Superintendent of Documents.

**Husband and Wife . . . annulment of marriage . . . wealthy woman who married impoverished Russian nobleman relying upon his false representations that he earned his own living, never took money from women and was marrying her to contribute to her happiness cannot obtain annulment of the marriage since fraud was not as to matters "vital" to the marriage relationship.**

■ *Woronzoff-Daschkoff* v. *Woronzoff-Daschkoff*, N.Y. Ct. of Appeals, March 13, 1952, Desmond, J., 104 N. E. 2d 877.

In 1947, plaintiff, a wealthy woman, married defendant, an impoverished *émigré* Russian nobleman. The parties cohabited while on their European honeymoon, but when they returned to New York City they quarrelled, defendant told plaintiff that he had married her for her money and plaintiff sued for an annulment of the marriage on the ground of fraud. Her complaint alleged that defendant had falsely represented that he had always earned his own living, had never taken money from women, that he married plaintiff to contribute to her happiness and support and that he was an American citizen. The trial court annulled the marriage. It found that plaintiff had relied on defendant's representations in giving her consent to the marriage and that these representations were false in that defendant had received large sums of money from women and his sole purpose in marrying plaintiff was for her money.

On appeal, the trial court's judgment was reversed and the complaint dismissed. The Court of Appeals unanimously ruled that, while the proof showed that defendant was "no model of chivalry or propriety", an annulment could be obtained only for fraud as to matters "vital" to the marriage relationship and "Premarital falsehoods as to love and affection are not enough, nor disclosure that one partner 'married for money' ". The Court said that "while we have, for better or worse, retreated (*Di Lorenzo* v. *Di-Lorenzo*, 174 N.Y. 467; *Shonfeld* v. *Shonfeld*, 260 N.Y. 477, 481) from the old idea that marriages can be voided only for frauds going to the essentials of marriage, that is, consortium and cohabitation, it is, nonetheless, still the law in New York that annulments are decreed, not for any and every kind of fraud . . . but for fraud as to matters 'vital' to the marriage relationship only. . . ." However, the Court indicated that since a husband is under a legal duty to support even a wealthy wife, a man's premarital intent not to so support her "might perhaps be enough to nullify a marriage". In this case the husband had never promised to support his wife and "obviously was never expected to".

**Husband and Wife . . . annulment of marriage . . . comity requires recognition of Mexican divorce . . . where Mexican divorce was granted on wife's personal appearance and her then husband was represented by authorized counsel, wife's second husband cannot obtain annulment of his New York marriage on ground of invalidity of wife's Mexican divorce.**

■ *Caswell, Jr.* v. *Caswell*, N.Y. Sup. Ct., N.Y. County, Special Term, Part III, March 26, 1952, Hammer, J.

In this action plaintiff husband sought an annulment of his marriage to defendant wife upon the ground that his wife's divorce from her former husband, which was obtained in Mexico, was invalid because the wife was not a bona fide resident of Mexico and the court

there did not have jurisdiction of the action. The wife had personally appeared in the Mexican action and her then husband was represented by duly authorized counsel.

Justice Hammer dismissed plaintiff's complaint and directed judgment for defendant. He held that the Supreme Court's ruling in *Cook* v. *Cook*, 72 S. Ct. 157, 96 L. ed. Adv. Ops. 94 (38 A.B.A.J. 148; February, 1952) precludes a stranger from raising the question of *bona fides* of residence in a case where one spouse appears personally in the divorcing jurisdiction and the other by authorized counsel. Although the *Cook* case involved the decree of a sister state which must be accorded full-faith and credit under Article IV, § 1, of the United States Constitution, Justice Hammer stated that as a matter of comity American courts have accepted decrees of foreign countries.

**Labor Law . . . National Labor Relations Board has no power to suspend attorney from practice before it without prescribing rule regulating admission or enrollment of persons authorized to practice before it.**

■ *Camp* v. *Herzog, Houston, Murdock and Styles, as members of the National Labor Relations Board,* U.S.D.C., Dist. of Col., April 7, 1952, Morris, D. J.

Plaintiff attorney assaulted a lawyer representing the National Labor Relations Board's General Counsel during a proceeding before a trial examiner and, as a result, he was barred from practicing before the Board for two years (see 37 A.B.A.J. 926; December, 1951). He appealed from the Board's order contending that it was entered without authority of law.

The sole issue to be determined, the Court said, is "whether or not the Board has the power to suspend or disbar a person from practice before it, and, if so; has that power been exercised as contemplated by the Congress". Judge Morris noted that the power to control, by admission and disciplinary action, persons who appear before administrative agencies, is not an inherent power, as is the case in judicial courts, but one which must be given by the legislative authority creating the agency. In support of this opinion he cited the Supreme Court's decision in *Goldsmith* v. *United States Board of Tax Appeals*, 270 U.S. 117, where it was held that the Board of Tax Appeals could deny an attorney permission to practice before it on the ground that Congress had intended it should have that power and the Board had adopted rules to that effect. However, although the Act creating the National Labor Relations Board provides that the Board shall have authority to make rules and regulations necessary to carry out the provisions of the Act, the Court said that the Board has nowhere prescribed any rule regulating the admission or enrollment of persons authorized to practice before it, except with respect to certain former employees of the Board and except for the rule providing for the exclusion of any person from a hearing for contemptuous conduct. By failing to prescribe such a rule, the opinion stated, "the Board has failed to exercise its delegated legislative function to provide the legislative sanction upon which the challenged order must rest". Judge Morris then emphasized the difference between the adjudicatory and rule-making processes. He remarked that "It is one thing for the Congress to say that an administrative agency shall have the right to prescribe by rule for the admission and disciplinary measures of attorneys practicing before it, and quite another to say that Congress intended such an agency to adjudicate and enforce disciplinary action without any statutory provision or rule promulgated in pursuance of statutory authority".

The Court concluded that the challenged order must be vacated. Judge Morris said that until the Board adopts a rule of practice providing for the disbarment of attorneys for unprofessional conduct, "it holds itself out as being willing that any party at interest be represented by any person of his choice".

**The President . . . Secretary of Commerce directed to take possession of and operate the plants and facilities of certain steel companies.**

■ Executive Order No. 10340, April 8, 1951 (17 Fed. Reg. 3139).

Under this Executive Order issued by the President the Secretary of Commerce is directed "to take possession" of eighty-six steel companies "as he may deem necessary in the interests of national defense", to operate them and to "determine and prescribe terms and conditions of employment" under which the plants are to be operated. The Order states that the existence of a national emergency was proclaimed on December 16, 1950, that a controversy has arisen between certain steel companies and their workers represented by the United Steel Workers of America, CIO, that the controversy has not been settled through collective bargaining processes or by the Wage Stabilization Board, that it is necessary to assure the continued availability of steel in the existing emergency and, therefore, the President has issued the Order "by virtue of the authority vested in me by the Constitution and laws of the United States, and as President of the United States and Commander in Chief of the armed forces . . . ." The Order also states that the Secretary is to recognize the right of collective bargaining, that, except as the Secretary otherwise directs, the managements of the plants shall continue their functions in the usual manner and "Except so far as the Secretary of Commerce may otherwise direct, existing rights and obligations of such companies shall remain in full force and effect, and there may be made, in due course, payments of dividends on stock, and of principal, interest, sinking funds, and all other distributions upon bonds, debentures, and other obligations, and expenditures may be made for other ordinary corporate or business purposes."

Publication of the Executive Order was made in the *Federal Register* of April 10, 1952.

**The President . . . temporary restraining order restraining seizure of steel plants denied . . . President's action may not be indirectly enjoined by suit against Secretary of Commerce . . . steel companies' remedies are in just compensation suits in Court of Claims if seizure is legal, and, if illegal, suits under Federal Tort Claims Act.**

▪ *Youngstown Sheet and Tube Co.* v. *Sawyer, Republic Steel Corp.* v. *Sawyer, Bethlehem Steel Co. et al.* v. *Sawyer,* U.S.D.C., Dist. of Col., April 9, 1952, Holtzoff, D. J.

The Secretary of Commerce, acting pursuant to the President's Executive Order of April 8, 1952 (*cf.* Executive Order No. 10340, immediately preceding), took possession of the plants of certain steel companies, among them the three companies who are plaintiffs in these actions. Plaintiffs sought a temporary restraining order restraining defendant, the Secretary of Commerce, from continuing in possession of the plants.

Denying the temporary restraining order, Judge Holtzoff stated that the balance of the equities is in favor of defendant and, also, plaintiffs have adequate remedies by way of actions for damages. An application for a temporary restraining order is addressed to the Court's discretion, he said, and, in addition to showing that the action sought to be enjoined is illegal, circumstances showing irreparable damage to plaintiffs' rights must be indicated. The Court stated that although the order, if granted, would run solely against the Secretary of Commerce, actually, it would be an injunction against the President because it would have the effect of nullifying the President's Executive Order. "It is very doubtful, to say the least," the Court said, "whether a Federal Court has authority to issue an injunction against the President of the United States, in person, *The State of Mississippi* v. *Johnson,* 4 Wall. 475".

Furthermore, the Court said that plaintiffs will not sustain irreparable damage if the order is denied. Plaintiffs argued that their control over labor relations would be displaced, but the Court replied that if this possibility arises, the applications for a restraining order could be renewed. Also, the Government's counsel conceded that plaintiffs have a remedy in suits for damages since, if the seizure is legal, a suit for just compensation will lie in the Court of Claims against the United States, and, if illegal, an action for damages lies under the Federal Tort Claims Act.

District Judge Pine, in the United States District Court for the District of Columbia, on April 29, 1952, granted plaintiff steel companies preliminary injunctions restraining the Secretary of Commerce from seizing their plants. However, on May 2, 1952, the United States Court of Appeals for the District of Columbia Circuit stayed Judge Pine's injunction order, pending the Supreme Court's review of the case. The United States Supreme Court granted certiorari May 3, 1952.

**Workmen's Compensation . . . editor's accidental drowning while swimming after fatiguing automobile business trip for employer occurred in course of his employment and supports award of death benefits.**

▪ *Davis* v. *Newsweek Magazine et al.,* N.Y. Sup. Ct., App. Div., 3d Dept., March 12, 1952, Brewster, J., 111 N. Y. S. 2d 228.

Claimant's decedent, a writer and science editor, was employed by appellant to take an eight-week automobile trip from New York to the West Coast during which time he was to visit various places and write articles to be submitted to appellant employer for publication. After a three-day stop at Oak Ridge, Tennessee, decedent continued his tour until he reached Biloxi, Mississippi, where he planned to write and to send to his employer an article based on his Oak Ridge visit. However, fatigued from his journey, he went swimming and accidentally drowned.

The question presented by the case was whether the accident arose out of and in the course of decedent's employment. The Court, affirming the Workmen's Compensation Board's award of death benefits to claimant, held that decedent's employee status was so "inextricably entwined with his tour" that his employment included the swim at Biloxi. Since his employment was that of a tourist which "exposed him to the risks incident to that status", the Court believed that it was "a natural risk of his employment which caused his death". In addition, decedent's attempt to get relief from his fatigue is regarded by the Court as a reasonable act in the course of his employment since "had it been successful, it would have been of some benefit to his employer in its more promptly receiving a better article which he was to write that night than would otherwise have resulted".

Foster, P.J., dissented because he believed that "Decedent's act was no more connected with his employment than if he had performed the same personal act of recreation at his home." He concluded that if the Board's reasoning is correct then "every personal act of the decedent on his trip was covered by compensation insurance, for it can be said that he was always preparing himself for his work".

**Further Proceedings in Cases Reported in This Division.**

▪ The following action has been taken in the United States Supreme Court:

AFFIRMED, April 7, 1952: *Uebersee Finanz-Korporation, A. G.* v. *McGrath*—Aliens (35 A.B.A.J. 329, April, 1949; 37 A.B.A.J. 227, 928, March, December, 1951).

REVERSED, April 7, 1952: *Greenberg* v. *U.S.*—Constitutional Law (37 A.B.A.J. 375, 536, 764, May, July, October, 1951; 38 A.B.A.J. 68, 318, January, April, 1952).

CERTIORARI DENIED, March 24, 1952: *Remington* v. *U. S.*—Trial (37 A.B.A.J. 847; November, 1951).

Mr. Justice Black and Mr. Justice Douglas dissented.

■ The following action has been taken by the United States Court of Appeals for the Second Circuit (see review *supra*):

REVERSED, April 7, 1952: *Kaiser-Frazer Corp.* v. *Otis & Co.*—Contracts (37 A.B.A.J. 689; September, 1951).

■ The following action has been taken by the United States Court of Appeals for the Ninth Circuit:

AFFIRMED, March 13, 1952: *Orloff* v. *Willoughby*—Army and Navy (38 A.B.A.J. 315; April, 1952).

■ The following action has been taken by the New York Supreme Court, Special Term, Part III, Queens County:

INJUNCTION GRANTED, April 1, 1952: *Rothbaum* v. *R.H. Macy & Co.*—Monopolies (37 A.B.A.J. 610; August, 1951).

■ The following action has been taken by the United States District Court for the District of Columbia (see review *supra*):

ORDER VACATED, April 7, 1952: *Camp* v. *Herzog et al. as members of the National Labor Relations Board*—Labor Law (37 A.B.A.J. 926; December, 1951).

### Additional Recent Decisions of Interest

■ *Kabatchnick* v. *Hanover-Elm Bldg. Corp.*, Mass. S. Jud. Ct., January 31, 1952, 103 N.E. 2d 692.

Landlord's liability for deceit in misrepresenting rental value of premises.

■ *Signs* v. *Signs*, Ohio S. Ct., February 13, 1952, 103 N.E. 2d 743.

A parent in his business capacity is not immune from liability to child for personal tort.

■ *Fountain* v. *Bank of America Nat. Trust & Savings Ass'n.*, Cal. Dist. Ct. of Appeal, February 1, 1952, 240 P. 2d 414.

Executor as "owner" of deceased's automobile within ownership liability provisions of the Vehicle Code.

■ *Rockwood* v. *Pierce*, Minn. S. Ct., February 1, 1952, 51 N.W. 2d 670.

Admissibility of state highway patrolman's testimony relative to a party's admission as to how automobile accident occurred.

■ *Loew's Inc.* v. *Wolff*, U.S.D.C. Cal., December 21, 1951, 101 F. Supp. 981.

Warranty of marketable title in sale of literary property.

■ *Bish* v. *Employers' Liability Assur. Corp., Ltd.*, U.S.D.C. La., January 28, 1952, 102 F. Supp. 343.

Statute authorizing direct action against liability insurer held invalid.

■ *Suwanee County Hospital Corp.* v. *Golden*, Fla. S. Ct., February 12, 1952, 56 So. 2d 911.

County hospital liable for tort despite statute otherwise providing.

■ *Resavage* v. *Davies*, Md. Ct. of App., March 7, 1952, 86 A. 2d 879.

Negligent motorist's liability to spectators for injuries due to nervous shock.

## Nominating Petitions

### Colorado

■ The undersigned hereby nominate William Hedges Robinson, Jr., of Denver, for the office of State Delegate for and from the State of Colorado, to be elected in 1952 for a three-year term beginning at the adjournment of the 1952 Annual Meeting:

W.W. Platt, of Alamosa;

Charles A. Baer, Nathan Lee Baum, Ben Bozeman, David Brofman, Leonard M. Campbell, Bernard B. Carraher, E. F. Conly, Frederick Cranston, William E. Doyle, Robert L. Gee, Fred W. Harding, Mark H. Harrington, Hubert D. Henry, Alex B. Holland, Stanley H. Johnson, Charles J. Kelly, Lawrence A. Long, William B. Miller, William Rann Newcomb, Michael Reidy, Charles W. Sheldon, Jr., Samuel S. Sherman, Jr., and Thomas D. Smart, of Denver;

William L. Gobin, of Rocky Ford.

### Nevada

■ The undersigned hereby nominate Calvin M. Cory, of Las Vegas, for the office of State Delegate for and from the State of Nevada, to be elected in 1952 for a three-year term beginning at the adjournment of the 1952 Annual Meeting:

D. A. Castle, Ralph L. Denton, Kenneth L. Mann, Grant Sawyer, Orville R. Wilson and Taylor H. Wines, of Elko;

John W. Bonner, B. Mahlon Brown, Oscar W. Bryan, Robert M. Callister, John G. Cope, G. William Coulthard, George M. Dickerson, Harvey Dickerson, Edwin J. Dotson, Roy Earl, Rulon A. Earl, Roger D. Foley, George E. Franklin, Jr., Toy R. Gregory, A. W. Ham, Jr., L. O. Hawkins, A. S. Henderson, J. K. Houssels, Jr., and Milton W. Keefer, of Las Vegas.

### Oregon

■ The undersigned hereby nominate William S. Fort, of Eugene, for the office of State Delegate for and from the State of Oregon, to be elected in 1952 for a three-year term beginning at the adjournment of the 1952 Annual Meeting:

Murray J. Agate, Edwin E. Allen, E. R. Bryson, Edward A. Butler, Windsor Calkins, William G. East, Lawrence T. Harris, Donald R. Husband, Charles O. Porter, L. L. Ray, Frank B. Reid and W. P. Riddlesbarger, of Eugene;

Paul L. Patterson, of Hillsboro;

Paul Farrens, B. J. Goddard and Richard B. Maxwell, of Klamath Falls;

Eugene Marsh and Francis E. Marsh, of McMinnville.

Herbert C. Hardy, Nicholas Jaureguy and Lamar Tooze, of Portland;

Robert G. Davis, of Roseburg;

Allan G. Carson, George A. Rhoten and J. Ray Rhoten, of Salem.

# Department of Legislation

**Charles B. Nutting, Editor-in-Charge**

■ The following article by Professor Carrothers, is the third of a series on legislative procedure in various lands. It describes in clear and vivid style the procedure in the Province of Nova Scotia. The basic similarity between the legislative procedure in this province and in many of the states of the United States will be of interest to readers of these pages.

## Legislative Procedure in Nova Scotia

by A. W. R. Carrothers, Assistant Professor, Faculty of Law, Halifax, Nova Scotia, Canada

■ *The Government of Nova Scotia.* The Province of Nova Scotia was the first to win democratic government in Canada. The province in theory had an inherent right to representative government, being considered a settled English colony rather than conquered territory. This right was gained in fact with the summoning of the first Legislative Assembly for Nova Scotia in 1758. Responsible government was recognized in 1848 when the cabinet, the Executive Council, acknowledged itself to be answerable to the Assembly. Today the Legislative Assembly meets in the port city of Halifax at Province House, a stone building of classic design first opened for the Assembly in 1819. The House of Assembly is the only House. The Legislative Council, the upper house composed of life appointees, was abolished in 1927. The Lieutenant Governor, appointed customarily for a term of five years by the Governor General in Council (the federal cabinet) represents the Crown in right of the Province of Nova Scotia.

The Legislative Assembly of thirty-seven members sits normally once a year in the late winter or early spring for a term of approximately seven weeks. Its procedure is patterned after that of the House of Commons of Canada and the Mother of Parliaments at Westminster.

*The Origin of Bills.* There is no formal procedure for the creation of bills in the first instance. Any given bill may be conceived and developed in a department of the government, in some government agency, in a society of the legal profession or in some other professional or trade organization, in some other interested group, or by an individual. But the cabinet form of government colors the legislative process in the stages prior to the introduction of bills in the House.

The leader of the majority party in the House is by tradition called upon by the representative of the provincial Crown, the Lieutenant Governor, to form a government. As premier, or first minister, he selects from among the members of his party who have been elected to the Assembly persons to fill the various ministries of the government. Together, they form the cabinet, or Executive Council. The cabinet is in the nature of a special committee of the House and is by tradition responsible to the Assembly.

Public bills are passed on by the cabinet and are introduced in the House by a minister of the government. Because the executive screens all proposed legislation of a public nature, lobbying takes the form of delegations to the cabinet rather than to individual members of the Assembly. Bills of a controversial nature are customarily referred to a caucus of the government party, a meeting of the government members of the Assembly.

Caucuses are held behind closed doors. It is here that the private member must make himself heard and persuade the cabinet by his vote to his views, for once the executive accepts a bill and a member of the cabinet introduces it in the House, party discipline requires that the private member of the government party support the bill.

Public (government) bills are drafted in the office of the legislative counsel, the law clerk, in consultation on substantive matters with the appropriate government department and its minister. Private bills are usually drafted by members of the legal profession and are certified correct in form by the law clerk.

*The House of Assembly.* The House of Assembly is in session. At the head of the House on a canopied dais sits the Speaker, chosen from among the government members. He wears the traditional black silk top hat, wing collar and white gloves. Before him a long table stretches part way down the center of the House. On either side of it sit the Chief Clerk of the House in barrister's dress of wing collar, white tabs, black waistcoat and full gown, and his assistant. At the end of the table farthest from the Speaker rests the four foot gilt mace, the symbol of the Speaker's authority. It has been placed there when the day's session began, by the Sergeant-at-Arms, himself wearing a silk top hat, wing collar and gray gloves, and bearing a dress sword.

In rows down the side of the House to the right of the Speaker and facing toward the center of the room are lined the government desks. Facing them to the Speaker's left across the floor of the House stand the desks of the opposition members. The premier, the leader of the government party, occupies a desk in the center of the government front row. In the front row opposite him sits the leader of Her Majesty's Loyal Opposition.

The balcony on three sides of the House is divided into galleries for the Speaker's guests, ladies, the press and the public.

*Daily Order of Business.* The Speaker each day follows with slight variation an established order of business: (1) presenting and reading petitions; (2) presenting reports of standing and select committees; (3) government notices of motion; (4) introduction of bills (first reading of both public and private bills); (5) notices of motion; (6) government motions; (7) public bills and orders (second and third readings of public bills, and references of public bills to the committee of the whole House); (8) motions other than government motions; and (9) private bills (second and third readings of private bills, and references of private bills to the committee of the whole House). A question period is provided for twice a week.

*First Reading.* The Speaker calls for the introduction of bills (item four on the order of business). A minister of the government (or it may be a private member of either side of the House) rises, is recognized by the Speaker, and begs leave "to introduce a bill entitled an Act" to deal with the matter at hand. The proposed bill, in typewritten form, is taken from him by a messenger and handed to the Speaker, who again reads out the title of the bill. The paper is passed to the Clerk of the House, who gives it a number. The Clerk reads out the full title of the bill together with its number. The Speaker orders the bill to be read a second time "at a future day". The bill then goes to the Queen's printer to be printed and distributed to the members and to interested persons.

*Second Reading.* The Speaker calls for public bills and orders (or for private bills: either item seven or nine on the order of business). The Clerk of the House rises and reads from a bundle of papers the title of the first bill then ready for second reading. The member who introduced the bill rises and begs leave to move second reading. He gives to the House a general description of the contents of the bill. If there is objection to the bill at this stage (an infrequent occurrence) the Speaker may order that the bill stand until a later date in order that the objection may be taken under advisement. Otherwise, the Speaker will declare the motion carried and order that the bill be referred to one of the standing or select committees of the House. The bill then goes into committee.

*Standing and Select Committees.* The House is divided into eleven standing committees: Privileges and Rules of the House; Mines and Minerals; Industry; Public Accounts; Humane; Agriculture; Temperance; Education; Lands and Forests; Law Amendments; and Private and Local Bills. Of these the last two are the most active, and between them consider the bulk of the legislation. The committees, varying in size from five to ten members, are appointed by the House pursuant to a list prepared at the opening of the session by a special committee appointed for that purpose. The committees meet at the call of the chairman (and sometimes on the direction of the House) during the hours when the House is not actually sitting (or when the House is sitting, with leave of the House) to consider the bills referred to them by the Speaker. Here, in an atmosphere of informality, is done the real work of considering, drafting and amending.

The House may from time to time appoint select (*ad hoc*) committees to deal with special matters.

Most committee meetings are held *in camera*, athough occasionally the public may be admitted in the discretion of the committee, when the legislation is of particular public interest.

When a bill has been passed by the committee on a majority vote, it is reported up to the House.

*Committee of the Whole House.* The Speaker calls for reports of standing and select committees (item two on the order of business). The chairman of the committee presents its report and recommends the bill "to the favourable consideration of the House" (with or without amendment, as the case may be). The bill is then placed on the Orders of the Day following, for reference to the committee of the whole house. Upon the Speaker next calling for bills (either public or private) those ready for reference receive consideration in priority to bills up for second reading. The Orders of the Day are prepared by the Clerk of the House, who puts in order of priority in accordance with the Rules of the House the various items of business ready for the attention of the House.

The House resolves that the bill be referred to the committee of the whole house. When regular business is completed for the day the House may go into committee on motion of the government leader "that the Speaker do now leave the chair and that the House resolve itself into a Committee of the Whole House on bills" (or to consider supply unto Her Majesty). The Speaker declares the motion carried and leaves his chair. The Sergeant-at-Arms places the mace on a rack under the clerk's table. The chairman of the committee of the whole house, who is appointed by the House on motion of the government leader, then occupies a chair in front of the Speaker's dais at the head of the clerk's table. In the informality of committee the bill is discussed clause by clause in numerical order, ending with the preamble and title. The committee of the whole house may refer a bill back for further consideration to the standing committee that reported it up to the House, but normally, after the bill has been considered, and a motion to pass the bill has been carried, it is resolved that "the Committee do now rise and report these bills" to the House. The Speaker then resumes his place and the mace is returned to the table. The Chief Clerk informs the Speaker that the committee of the whole house has considered the bill and reports it to the House for consideration. The Speaker asks when the bill shall be read a third time. The House resolves that it "be read a third time at a future day".

*Third Reading.* The following day the Speaker calls for public bills and orders (or private bills: items seven and nine on the order of business). Bills ready for third reading here receive priority over references to the committee of the whole house and second readings. In third reading no important amendments are usually made, although there is provision therefor on notice.

The bill is put to a vote. If it is passed by a majority of the House the Speaker orders "that the bill do pass and the title be as read by the Clerk". He then orders that the bill be engrossed, that is, that there be prepared a true, clean copy. The engrossed copy is authenticated by the Speaker and the Chief Clerk.

*Royal Assent.* On the day of formal prorogation of the House, the Lieutenant Governor signs the engrossed bill and declares that "In the name of Her Majesty I assent to this Bill." The bill now becomes law. A copy of the Act, certified by the Chief Clerk, is sent to the Queen's Printer. There it is chaptered and printed, and bound in the annual volume of the Statutes of Nova Scotia.

# OUR YOUNGER LAWYERS

Robert A. Stuart, Secretary and Editor-in-Charge, Springfield, Illinois

■ The Members of the Executive Council together with the various National Committee Chairmen of the Junior Bar Conference met at the Mid-Year Meeting of the Conference held at the Edgewater Beach Hotel in Chicago on February 23 and 24. Those attending the two-day session were Paul W. Lashly, St. Louis, Missouri, Chairman; Richard H. Bowerman, Vice Chairman, New Haven, Connecticut; Robert A. Stuart, Secretary, Springfield, Illinois; William F. Womble, Fourth Circuit, Winston-Salem, North Carolina; Thomas G. Greaves, Jr., Fifth Circuit, Mobile, Alabama; Charles W. Joiner, Sixth Circuit, Ann Arbor, Michigan; Stanley B. Balbach, Seventh Circuit, Urbana, Illinois; Wiley E. Mayne, Eighth Circuit, Sioux City, Iowa; Frank E. Day, Ninth Circuit, Portland, Oregon; Harold H. Clifford, Tenth Circuit, Oklahoma City, Oklahoma; Bryce Rea, Jr., District of Columbia, Washington, D. C.; Charles L. Davis, Jr., Member-at-Large, Topeka, Kansas; Robert G. Storey, Jr., Member-at-Large, Dallas, Texas; C. Baxter Jones, Jr., Chairman, Activities Committee, Atlanta, Georgia; Thomas Cooch, Chairman, By-Laws Committee, Wilmington, Delaware; Alvin B. Rubin, Chairman, Continuing Legal Education Committee, Baton Rouge, Louisiana; Thomas H. Law, Chairman, Co-operation with Junior Bar Groups Committee, Fort Worth, Texas; John R. Baylor, Chairman, Courts of Limited Jurisdiction Committee, Lincoln, Nebraska; Ben Paul Noble, Chairman, Defense Mobilization Committee, Washington, D. C.; Eileen O'Connor, Chairman, Inter-American Bar Committee, Washington, D. C.; Frederick D. Lewis, Jr., Chairman, Law Students Committee, Des Moines, Iowa; Charles B. Levering, Chairman, Lawyer Placement Committee, Baltimore, Maryland; Ulrich Schweitzer, Chairman, Legal Aid Committee, New York City, New York; G. Gregg Everngam, Chairman, Membership Committee, Silver Springs, Maryland; Rosemary Scott, Chairman, Procedural Reform Studies, Grand Rapids, Michigan; Robert Lockwood, Chairman, Public Information Program, New York City, New York; Lofton L. Tatum, Chairman, Unauthorized Practice Committee, Portland, Oregon; James M. Spiro, Chairman, War Readjustment Committee, Chicago, Illinois; Frederick C. Schillinger, Vice Chairman, Defense Mobilization Committee, St. Louis, Missouri; Chester J. Byrns, Director of the Law Student Program of the American Bar Association, Chicago, Illinois; Donn N. Gregory, Vice Chairman, Membership Committee, Tampa, Florida; Frank J. Roan, Jr., Vice Chairman, Membership Committee, Marion, Illinois.

The session proved to be one of the most productive of the recent meetings of the Conference and the reports indicated that an active program was under way for the current year.

One of the problems confronting the Conference is that of organization and administration. As has been emphasized in the experience of the past years, one of the major criticisms levelled against the Conference, and perhaps other sections in the organized Bar, is that it is actually a paper organization. The reports submitted at the Mid-Year Meeting of the Conference, however, clearly refute this premise. This criticism in a large measure arises, perhaps, from the volume of administrative detail which must, of necessity, be acomplished in order to establish a working organization composed of members from all of the various sections of the nation. It must be borne in mind that this entire organization must be revised each year. Accordingly, the handling of these details consumes a great amount of time and yet must be accomplished in this manner, particularly in a Section limited by age where each year many of its active members become ineligible for further participation and must, therefore, be replaced.

For the purpose of eliminating the delay resulting from the handling of the detail in the making of appointments and which delay has always hampered the officers of the Conference in getting a working program under way, at the annual meeting held in New York City in September

of 1951, a new appointment procedure was approved and is in effect this year for the first time. The procedure, designated as the "X" procedure, was based upon placing the responsibility of seeing that appointments were made in the particular time allotted upon an officer of the Conference, other than the National Chairman.

This year that responsibility was delegated to the originator of the plan, C. Baxter Jones, Jr., the Chairman of the Activities Committee. Because of the energy and diligence of Mr. Jones in working with the National Chairman, for the first time, at least in many years, the greater majority of all appointive positions in both the state and national organizations had been filled by January 1, 1952.

With the same purpose in mind, namely that of streamlining the Conference organization and thereby increasing its effectiveness, the Activities Committee in its report to the Executive Council submitted the following suggestions for consideration:

1. The automatic elevation of the National Vice Chairman each year to the office of National Chairman.

2. An increase in the number of national officers from three to seven; the seven officers who might be designated as:

(a) National Chairman
(b) National Vice Chairman
(c) Organizational Secretary (to head the functions rendered by Activities Committee under the "X" procedure)
(d) Recording Secretary
(e) Director of Personnel
(f) Director of Service
(g) Director of Standards

(The function of the three directors would be that of coordinating the various committee programs.)

3. General reorganization of committees of the Conference and their functions.

These various suggestions are receiving further consideration and study by the Activities Committee, which Committee will submit specific recommendations to the Council at its annual meeting in San Francisco.

### Regional Meetings

The Junior Bar Conference held a Regional Meeting in conjunction with the Ohio Valley Regional Meeting of the American Bar Association, on April 10, 11 and 12 at the Brown Hotel in Louisville, Kentucky. Richard H. Bowerman, National Vice Chairman, served as general chairman of the Junior Bar Conference Meeting which included a banquet in the Roof Garden of the Brown Hotel and at which Robert D. Branigin, President of the Indiana Bar Association, appeared as the principal speaker on Thursday evening, and a business session on Friday.

The second Regional Meeting of the Junior Bar Conference will be held in conjunction with the Yellowstone National Park Regional Meeting of the American Bar Association at Canyon Hotel, June 17 through 20, 1952. Co-chairmen of Arrangements for this meeting are Harold H. Clifford, Frank E. Day and Robert A. Stuart.

Through these Regional Meetings an opportunity is afforded to the various members of the Junior Bar Conference to participate in a discussion of the organization and problems confronting the Conference in the individual states. The purpose of the National Officers and Members of the Council attending these meetings is to assist the State Chairmen in the establishment of a program where none exists or in the extension of an already existing program. Those attending the Louisville meeting were enthusiastic about the possibilities for discussion and it is hoped that a large number of members from the western and midwestern states will attend the Yellowstone National Park Regional Meeting in June.

# THE DEVELOPMENT OF INTERNATIONAL LAW

**Richard Young** • Editor-in-Charge

## Treaty Provisions in Foreign Constitutions

■ The place occupied by treaties in the legal system of the United States is a matter which has become the object of renewed scrutiny both within and outside professional circles. Discussion has centered on the controlling clause of the Constitution, unchanged since 1789, which reads:

> This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. . . .

Some fear today that this unqualified provision regarding treaties, as interpreted by the Supreme Court in *Missouri* v. *Holland*[1] and other cases, affords a means of modifying the American political system, and particularly the distribution of federal and state powers, in a manner which jeopardizes the best interests of that system.

Various measures to correct this alleged danger, by means of constitutional amendment or otherwise, have been proposed and are currently the subject of debate. Without entering here into the merits of this controversy, it may be useful to note, for purposes of information and comparison, the provisions of a number of foreign constitutions regarding the position of treaties in municipal law.[2]

Two aspects of the problem need to be distinguished. First is the general question, common to both unitary and federal states, whether treaties are or are not to be regarded as *per se* part of a state's municipal law, binding and enforceable in the same manner as domestic legislation. Second is the question, peculiar to federal states, whether treaties concluded by the central government are to be allowed to modify the established distribution of powers between the central and regional governments. This second question may arise whether or not treaties are considered part of municipal law, since it may be presented by legislation enacted by a central government to carry out treaty obligations in a field allegedly beyond its powers.

### I

With respect to the first question, examination of a number of representative constitutions from all parts of the world discloses a wide diversity of treatment. At one end of the scale are those states which specifically deny to a treaty any effect in municipal law until legislative action upon it has been taken. This is the long-established constitutional practice in Britain.[3] It is also expressly formulated in Article 29 (6) of the 1937 Constitution of Ireland:

> No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas [Parliament].

To the same effect is the 1947 Constitution of Burma:

> No international agreement as such shall be part of the municipal law of the Union, save as may be determined by Parliament. [Section 214].

At the other end of the scale are provisions such as that in the French Constitution of 1946:

> Diplomatic treaties duly ratified and published shall have the force of law even though they may be contrary to internal French legislation; they shall require for their application no legislative acts other than those necessary to authorize their ratification. [Article 26].

Treaties relating to international organization, peace treaties, treaties dealing with commercial, financial, or territorial questions or with the position of French citizens abroad, and treaties modifying French internal legislation, can be ratified only pursuant to a law.[4]

Similar in purport is the [South] Korean Constitution of 1948:

> The duly ratified and published treaties and the generally recognized rules of international law shall be valid as a binding constituent part of the law of Korea. [Article 7].

A subsequent clause requires the consent of the National Assembly to certain treaties of types similar to those enumerated in the French Constitution.

Between these two extremes lie a large number of constitutions which do not define precisely the position of treaties in relation to municipal law. Many are silent on the question; others contain provisions not wholly clear. Thus Article 98 of the Japanese Constitution of 1946 declares simply that "the treaties concluded by Japan. . . shall be faithfully observed"; but whether this is an injunction to the Government in its relations with other Governments, or whether it is a mandate binding in domestic law, is not self-evident. It may be noted that the clause in the same article which proclaims the supremacy of the Constitution provides that "no law, ordinance, imperial rescript or other act of government" contrary thereto shall have legal validity. The ultimate determination of constitutionality is assigned expressly to the Supreme Court.

Although the Philippine Constitution of 1935 is in many ways modelled upon that of the United States, it contains no provision specifically declaring treaties to be part

1. 252 U.S. 416, 64 L. ed. 641 (1920). On the history of the constitutional provision, see D. P. Myers, "Treaty and Law under the Constitution", 26 Dept. of State Bull. 371-376 (1952).

2. Most of the constitutional texts cited hereafter are to be found in A. J. Peaslee, *Constitutions of Nations*, 3 volumes (1950). Reference may also be made to D. R. Deener, "International Law Provisions in Post-World War II Constitutions", 36 *Cornell L. Q.* 505-533 (1951).

3. "Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive . . . decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes." Lord Atkin, in *Attorney General for Canada* v. *Attorney General for Ontario*, [1937] A. C. 326 at 347.

4. A constitutional amendment containing provisions which resemble those of the French Constitution is reported in March, 1952, to be in process of adoption in the Netherlands.

of the supreme law of the land. Instead there is a clause, perhaps even broader, announcing the adoption of "the generally accepted principles of international law as part of the law of the Nation" (Article II (3)). The possible unconstitutionality of a treaty is envisaged in a later section (Article VIII (10)) which provides:

> All cases involving the constitutionality of a treaty or law shall be heard and decided by the Supreme Court *in banc*, and no treaty or law may be declared unconstitutional without the concurrence of two-thirds of all the members of the court.

Mention may also be made of the different formula found in the 1915 Constitution of Denmark. By Section 18 of that instrument, the King is barred from undertaking, without the consent of Parliament, "any engagement that may alter existing constitutional conditions".

II

With respect to the second question proposed above, reference may be made to the constitutional provisions and practice of Switzerland, Mexico, Western Germany, India, Canada and Australia. While it may be debatable whether all of these are true federal states, they all contain substantial elements of federalism and are faced with the problem of reconciling national and regional fields of authority.[5]

The Swiss situation appears unique. By the Constitution the Federal Tribunal, the nation's highest court, is required to act in accordance with all laws enacted, and all treaties ratified, by the Federal Assembly. The method of correction available for alleged infractions of the constitution by the federal government is not judicial review, but the popular referendum. Subject to certain qualifications, any federal law of general import, and any treaty intended to run indefinitely or for more than fifteen years, must be submitted to a vote of the people upon the demand of 30,000 citizens or of eight of Switzerland's twenty-two cantons. In at least one instance, in 1923, such a vote resulted in the rejection of a treaty.

In Mexico the Constitution of 1917 provides expressly that all powers not granted to the federal government are reserved to the states (Article 124). Treaties may be made by the President with the consent of the Senate, and the effect of such treaties is thus set forth in Article 133:

> This Constitution, the laws of Congress arising thereunder, and all treaties in accordance therewith already entered into or which, in the future, may be entered into by the President of the Republic, with the approval of the Senate, shall be the supreme law of the land. And the judges in every state shall be bound by this Constitution and by those laws and treaties, in spite of conflicting provisions in the constitution or laws of any state.

Although this language in general closely resembles that of the United States Constitution, it is noteworthy that the position of treaties as part of the law of the land has been made expressly dependent on their being in accord with the Constitution. Resort may be had to the federal courts in controversies involving treaties or alleged encroachment on the rights of either the federal or state governments (Articles 103-104), and possibly under these provisions the courts might pronounce a treaty to be not in accord with the Constitution.

The Basic Law of the Federal Republic of Germany—the so-called "Bonn Constitution"—was adopted in 1949. Article 25 of that instrument declares:

> The general rules of international law shall form part of federal law. They shall take precedence over the laws and create rights and duties directly for the inhabitants of the federal territory.

By Article 100 (2) it is further provided:

> If in litigation it is doubtful whether a rule of international law forms part of federal law and whether it creates direct rights and duties for the individual (Article 25), the court shall obtain the decision of the Federal Constitutional Court.

The treaty-making power is vested in the Federal President, but treaties involving the political relations of the federation or referring to matters of federal legislation require approval in the form of a federal law (Article 59). Conflicts regarding the respective constitutional rights and duties of the federal government and the *länder* or state governments are to be resolved by the Federal Constitutional Court (Article 93).

In India, Canada, and Australia the British doctrine has been followed that treaties are not *per se* part of municipal law. Each, however, has had to consider the problem of the effect to be given, under a federal or quasi-federal system, to national legislation implementing obligations resulting from treaties.

Of particular interest have been constitutional developments in India. Under the Government of India Act, 1935, which was the basic law of India in the last years before independence, one of the exclusive powers assigned to the federal legislature was that to implement treaties and agreements with other countries. A large number of other powers were reserved exclusively to the provinces and federated states. It was then provided further that the federal legislature should not, by virtue of the power to implement alone, have power to make any law for a province or federated state except with the consent of the governor or ruler thereof.

In the Indian Constitution of 1950, based in substantial measure on experience under the 1935 Act, a similar division of legislative powers was made; but quite an opposite view was taken of the power to implement treaties. Article 253 of the Constitution reads:

> Notwithstanding anything in the foregoing provisions of this Chapter [relating to the distribution of legislative powers], Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries, or any decision made at any international conference, association or other body.

In the words of an Indian commentator, "This article is intended to make it clear that the power to enter into treaties conferred on Par-

5. See generally K. C. Wheare, *Federal Government* (2d ed., 1951), pages 178-196.

liament, carries with it, as incidental thereto, a power to invade State subjects to enable the Union to implement the treaty."[6]

The change of view in India may have resulted, at least in part, from the experience of Canada in the 1930's. Under the British North America Act, 1867, legislative powers in Canada are distributed between central and provincial governments, the central government being given power under Section 132 to carry out all obligations of Canada arising under treaties between the British Empire and foreign countries. In 1935 Canada became a party to certain conventions of the International Labor Organization, dealing with subjects admittedly reserved to the provinces under the Act of 1867, and attempted to implement them by federal legislation. Certain of the provinces challenged this attempt.

The constitutional issue thus raised reached the Judicial Committee of the Privy Council in 1937, in the case of *Attorney-General for Canada* v. *Attorney General for Ontario*.[7] The Judicial Committee held the legislation *ultra vires* and invalid. The conventions in question, it said, were solely Canadian obligations and were not Empire treaties within the meaning of Section 132; power to carry them out therefore depended on whether their subject matter fell within the Dominion's ordinary legislative competence; and the subject matter here did not so fall. Speaking for the Committee, Lord Atkin continued:

> It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and Provincial together, she is fully equipped. But the legislative powers remain distributed, and if in the exercise of her new functions derived from her new international status Canada incurs obligations they must, so far as legislation be concerned, when they deal with Provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces. While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure.[8]

The decision was severely criticized in Canada. In the words of Professor Norman MacKenzie, now President of the University of British Columbia,

> The result of their Lordships' decision seems to be: that for international purposes Canada is no longer a nation, not even a league of nations, but a strange agglomeration in which the parties with power (the Provinces) have no status (internationally), and the party with status (the Dominion) has no power.[9]

The Australian Constitution of 1900 confers no specific power on the Commonwealth Parliament to implement treaties by legislation; but it does grant power to make laws "with respect to external affairs" (Section 51, xxix). The scope of this power was considered by the High Court of Australia in 1936 in *The King* v. *Burgess, ex parte Henry*,[10] a case involving an unlicensed air journey contrary to regulations made, under the Commonwealth Air Navigation Act, 1920, to give effect to the Paris Air Navigation Convention of 1919. The flight was made entirely in intrastate commerce, a subject solely within state competence under the Constitution unless the external affairs power was broad enough to support the Commonwealth legislation.

The High Court, although it found the particular regulations involved to be invalid, unanimously took the view that the external affairs power did enable the Commonwealth to carry out the 1919 Convention by appropriate legislation, even though this required entrance into a field reserved to state authority. The case thus appears to establish the principle that in Australia it is possible for the Commonwealth government, by making a treaty, to bring within the scope of its powers subjects which without a treaty would be outside those powers.[11] Some of the judges indicated a belief that there might be limits which legislation under the external affairs power could not transgress, but no such limits were laid down with precision; it was observed that the question of a treaty made in bad faith by a Commonwealth government, merely in order to extend its powers, could be dealt with when it arose.

The data here assembled make possible a number of statements of fact on points regarding which there has been some confused discussion in this country. Thus, while there is great diversity of practice among states, it is clear that the United States Constitution is not unique in establishing treaties as part of municipal law. On the contrary, provisions to substantially the same effect, recognizing treaties or the rules of international law to be part of the national law, are found in countries as diverse as France, the Philippines, Korea, Mexico, and Western Germany. It is also significant that the majority of these countries have adopted or reaffirmed this view within recent years.

Again, the power of a federal government to modify, as the result of treaty engagements, the distribution of powers between central and regional authorities is not a peculiarly American phenomenon. Similar powers exist by express provision or judicial interpretation in Switzerland, India and Australia, and perhaps also in Mexico and Western Germany. In Canada only has such power been denied, by a tribunal extraneous to the country. In this field too it is evident that the recent trend has been to favor the possession by the national government of powers adequate to enable it to discharge its international responsibilities. Growing recognition of the interdependence of the nations of the world seems to be the chief reason for the trend.

6. V. N. Shukla, *The Constitution of India* (1950), page 241.
7. [1937] A.C. 326.
8. [1937] A.C. at 353-354.
9. "Canada: The Treaty-making Power," 18 *British Year Book of International Law* (1937), pages 172-175. See also F. R. Scott, "Centralization and Decentralization in Canadian Federalism," 29 *Canadian Bar Review* 1095 at 1112-1115 (1951).
10. 55 C.L.R. 608 (1936).
11. See K. H. Bailey, "Australia: Federal States in External Relations", 18 *British Year Book of International Law* (1937), pages 175-176.

# Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Harry K. Mansfield, Chairman.

## Shifting from Corporate to Unincorporated Business Form

■ "The present decision, at least by implication, seems to mean that once a man starts doing business in corporate form, he may not discontinue it and resume operations in his own name, or that of his nominee, so far as federal taxes are concerned." This serious criticism of the Second Circuit's affirmance of the Tax Court's decision in the *58th Street Plaza Theatre* case *(58th Street Plaza Theatre, Inc.* v. *Commissioner,* —— F. 2d —— (2d Cir., March 18, 1952), *affg.* 16 T.C. 469) isn't merely a defeated taxpayer's reaction to a lost case. It is, rather, the dissenting opinion of Judge Swan, and it spotlights the extremes to which the business purpose doctrine of *Gregory* v. *Helvering* may be carried.

This recent case involved a shifting of income from a corporation to an individual. A family-owned theater-operating corporation had bought a valuable lease of the theater property from its majority stockholder. The corporation subsequently subleased the theater property to the majority stockholder's wife, also a stockholder, who thereafter purported to be the operator. The Tax Court found that (1) the lease was actually entered into, (2) the wife took an interest in operating the theater and gave it some of her time, (3) she assumed some of the risks and responsibilities, and (4) she received the net income as her own and used it without restriction for her own purposes. The Tax Court made no finding that the sublease was not made for a fair rental. Despite this evidence of a real sublease, the Tax Court and Second Circuit both upheld the Commissioner in refusing to recognize the sublease, so that all the income from the operation of the theater was first taxed to the corporation and then taxed again to the wife as a dividend.

Disregard of an apparently real sublease was based on the Tax Court finding that it "served no business purpose of Plaza but was a family arrangement to give Jeannette increased income at the expense of Plaza and without payment of taxes thereon by Plaza". The Tax Court concluded, "Motives other than the best interest of Plaza motivated the sublease to Jeannette."

If a corporate transaction entered into for the tax benefit of the stockholders but against the best business interest of the corporate entity is *ipso facto* a sham which the Commissioner may disregard, many businessmen who operate as a corporation may find themselves locked into the corporate form even though a changing tax picture might warrant a shift to the partnership or individual proprietorship form of business. For example, suppose that Mr. Smith, sole stockholder of a profitable corporation, follows his legal adviser's suggestion to liquidate and operate henceforth as a sole proprietor. Since a sublease resulting in partial loss of income is against a corporation's best business interests, the complete obliteration of the corporation by liquidation is logically even more clearly against its own best interests. Following the *Plaza Theatre* reasoning, Mr. Smith's earnings as a sole proprietor might be taxed first to his otherwise defunct corporation and again to himself as a dividend. Such a result, however, would mark a startling departure from established tax law.

The Courts of Appeals for the Fifth and Ninth Circuits are more liberal than the Second Circuit and Tax Court on the matter of shifting income from a corporation to some other unit controlled by the corporation's owner. In *L. W. Tilden, Inc.* v. *Commissioner,* 192 F. 2d 704 (5th Cir. 1951), the Fifth Circuit was confronted with a situation in which a family-controlled corporation leased its property to a joint venture consisting of the corporation's stockholders. The members of the joint venture applied part of their earnings from operating the property in payment of mortgages on the leased property. The court specifically agreed with the Tax Court's finding that "the joint venture was to be operated for the benefit of its members and not for the benefit of petitioner". It also agreed that the "sole purpose" of the lease "was to avoid the payment of excess profits taxes by petitioner and apply the tax savings thus realized to the payment of its mortgage indebtedness". But it completely disagreed with the Tax Court's conclusion that the creation of the joint venture and the lease by the corporation were a sham and that the income of the joint venture was taxable to the corporation. The court looked at the entire family picture instead of compartmentalizing the corporation and the venture. The family wanted to save its property by paying off the mortgages. Therefore "when it became clear to the Tildens that to continue to operate the properties under the corporate form into which they had been temporarily cast, in order to pay the debts and save them for their owners, would defeat the very purpose behind the assumption of this form, and they formed the venture, their actions in doing so had substance". The court apparently was satisfied that the shift of income could be made by a lease without necessitating a complete liquidation of the corporation.

The Ninth Circuit faced this problem in *Twin Oaks Co.* v. *Commissioner,* 183 F. 2d 385 (9th Cir. 1950). A closely held corporation transferred its operating assets to a partnership consisting of the stockholders and their wives. The partnership paid for this transfer, and it also leased from the corporation the land needed for carrying on the business. The Tax Court upheld the Commissioner in taxing the partnership income to the corporation. But the Ninth Circuit pointed out that it is "well settled that a taxpayer is free to adopt such legal organization for the conduct of his affairs as he may choose; he may convert from the corporate method to the partnership method of doing business and, though his motive in so doing be to reduce taxes, the conversion must be accorded recognition unless it is such a sham, such a change in form only, without substance, as to require that it be disregarded for tax purposes". The court then pointed out that the Tax Court's claim of sham or of a mere formal change was based on the fact that the profits were distributed to the same people, but only in different manner or proportions. But, as the Ninth Circuit stated, this in no way shows that the corporation rather than the partnership earned the income, and it ignores the reality of the conversion from the corporate to the partnership form of doing business.

As to whether a complete liquidation of the corporation is necessary, the Ninth Circuit made this point: "It seems obvious that if petitioner's affairs had been completely liquidated, the income in question would necessarily have been regarded as earned by the partnership. The mere fact that the parties stopped one step short of liquidation, *i.e.,* kept the corporation alive for the sole purpose of holding title to the real estate, while selling and transferring the operating business itself to the partnership, does not, we believe, detract from the reality or substance of what was done or require that all the income of the business be taxed to petitioner."

The Second Circuit has also had before it the specific case of a partnership formed by the stockholders and salesmen of a corporation to take over the selling functions previously performed by the corporation. With practically no discussion of the facts, the court held that the partnership served no business purpose and was therefore a "sham", "fiction", etc. The partnership income was therefore taxable to the corporation. *Kocin* v. *United States,* 187 F. 2d 707 (2d Cir. 1951).

The Tax Court has, in a number of cases, upheld the splitting off of part of a corporation's business to be carried on by stockholders of the corporation. *Miles-Conley Co., Inc.,* 10 T.C. 754, *affd.* on other issues 173 F. 2d 958 (4th Cir. 1949); *Cedar Valley Distillery, Inc.,* 16 T.C. 870; *Seminole Flavor Co.,* 4 T.C. 1215 (A); *Est. of Julius I. Byrne,* 16 T.C. 1234; *Buffalo Meter Co.,* 10 T.C. 83 (A); *John Wachtel Corp.,* 4 T.C.M. 768. These all presumably violate the Second Circuit's rule that shifting income away from a corporation cannot be a business purpose of the corporation.

The Second Circuit's attitude is somewhat difficult to reconcile with a statutory provision like Section 112 (b) (11) of the Code, added by Section 317 of the 1951 Revenue Act. If certain conditions are met, that provision allows a corporation to spin off part of its assets to another corporation in exchange for the other corporation's stock; the shares of the latter corporation can then be distributed to the first corporation's stockholders free of tax, even though they turn in no shares of the first corporation in exchange. When a corporation undertakes this type of spin-off, it presumably turns over part of its earning power to the new corporation. Such a transfer would be against the first corporation's best interests and would apparently lack business purpose under the Second Circuit's rule. Yet since Congress adopted the provision, it was apparently satisfied that taxpayers could qualify under it. It would seem to follow that Congress does not have in mind a business purpose doctrine as strict as the Second Circuit.

Because of the uncertainties in this entire area, the safest procedure in shifting income from the corporate form would be to liquidate the corporation, if at all possible. Despite the implied warning of Judge Swan's dissenting opinion in the *Plaza Theatre* case, it is difficult to believe that the Second Circuit will try to apply its business purpose doctrine to complete liquidations.

Contributed by committee member Leon Gold.

# BAR ACTIVITIES

**Paul B. DeWitt · Editor-in-Charge**

Harold R. MEDINA

■ At the Regional Meeting of the American Bar Association in Louisville, Kentucky, chairmen of a number of the state committees of the Section of Judicial Administration, of which Judge Harold R. Medina is the Chairman, made progress reports. An outstanding report was made for the North Carolina Committee, of which Fred B. Helms, of Charlotte, is the Chairman. The Carolina Committee decided that the first objective was to secure the enactment of a bill creating a Commission for the Improvement of the Administration of Justice. The executive, legislative and judicial branches of government, the public, the law schools, and a cross section of the Bar were represented on the Commission. Provision was made for the employment of a full-time Research Director.

The commission subdivided into two major committees—one to deal with civil law and the other with criminal law. The commission did not submit a lengthy report and recommendations, but instead prepared and sponsored specific bills. This approach produced excellent legislative results. The improvements achieved included the following:

1. A pretrial statute which is finding wider acceptance and usefulness every day.

2. The power of assignment of judges to the Chief Justice.

3. Creation of the office of Administrative Assistant to the Chief Justice whose duties are similar to those of the Director of the Administrative Office of the United States Courts.

4. Provision for increasing judicial manpower without restricting the state.

5. The creation of a Judicial Council whose work has already made itself felt by the enactment of many of its proposals by the legislature at its 1951 session.

6. The creation of a permanent Commission to revise the statutes and Code which employs a full-time reviser.

7. The creation of a Special Commission to make a study of administrative practice and procedure and report to the 1953 legislative session.

8. The grant of power to the Chief Justice to, in effect, abolish the compulsory rotation of trial judges which had handicapped the effective functioning of pretrial practice and procedure.

Mr. Helms concluded from his experience that leadership in the improvement of the administration of justice must come from the Bench and Bar.

Substantial progress was also reported from Virginia where Robert T. Barton, Jr. is the Section's Chairman. The Virginia legislature has created the office of Executive Secretary for the Supreme Court. This makes Virginia one of the states to have adopted a majority of the Section's recommendations. Virginia has a Judicial Council and a Judicial Conference. The rule-making power is vested in the Supreme Court of Appeals, which has adopted improved rules of practice and procedure. The practice before administrative tribunals has been regulated. The Virginia Committee plans in the future to work for the improvement of the jury system and better method of selection of jurors. The Committee will also consider the simplification of the law of evidence.

In other parts of the country equally good progress is being made by the state committees of the Section. In Oklahoma the Section's Committee, under the Chairmanship of David I. Johnston, succeeded in getting the legislature to simplify procedure during trial and procedure in perfecting appeals. The legislature also passed legislation requiring court rules to furnish statistical data for use by the Supreme Court and the Judicial Council. The Committee also succeeded in getting legislation to provide for the attendance at Judicial Conferences of Superior Court Judges.

Alfred P. O'HARA

In Wisconsin the Chairman of the Section's committee is E. H. Hallows. The committee was instrumental in securing the establishment of a judicial pension system which was a notable achievement because for some thirty years similar legislation had been voted down by the legislature. The committee helped to draft and secure the passage of legislation establishing a Judicial Council. The new Council is composed of fourteen members including laymen, judges, deans of law schools, legislators, and four lawyers. The committee also supported legislation which raised the salary of circuit court judges and will continue to press for increases for Supreme Court judges.

The work of the Section's committees is under the immediate supervision of the Chairman of the Section, Judge Medina, Judge Emory H. Niles, a member of the Section's

Council, and the Section's Director of State Committees, Alfred P. O'Hara. Communications concerning the work of the State Committees should be addressed to Mr. O'Hara, 36 West 44th Street, New York 36.

■ In March the State Bar of Texas made final plans for raising funds for the construction of a new headquarters building in Austin. The building will be located two blocks north of the Capitol Building. Everett L. Looney is Chairman of the Building Committee, and J. Glenn Turner is Chairman of the Finance Committee.

■ The Committee on Continuing Legal Education of the Oregon State Bar has published in connection with the spring session of its series of institutes a brochure outlining the program. Among the topics to be discussed are tax changes affecting business ventures, tax problems of the small town lawyer, wage and salary stabilization, automobile law and family situations, and *res ipsa loquitur*.

# Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

## A Quotation Set Aright

■ Your March issue has just been brought to my attention, containing a letter from Mr. W. Clark Hanna which seriously misquotes me. Mr. Hanna says "A little while back the editor of the *Christian Science Monitor* remarked, 'Objective journalism is basically wrong; the facts need careful interpretation.'" I never made any such observation and I thoroughly disagree with it. Mr. Hanna says my remark was "quoted with approval by Walter Winchell", an incident of which I have no knowledge. Presumably he is quoting from an alleged report of my remarks in *Time* magazine on May 28, 1951, which was itself inaccurate or at best greatly oversimplified.

I thoroughly agree with Mr. Hanna's thesis that objective reporting is vital. All that I have ever asked is that it be objective by presenting facts in their proper context. My observations from which his misquotation may have been culled and garbled were as follows:

> The informational function of the newspaper has become more and more objective. There is an increasing effort to keep opinion or prejudice—though not interpretation—out of the news columns.
>
> This news is the hard core of the newspaper. Without it, the newspaper ceases to be a newspaper. And to the degree that a newspaper cuts down on its indispensable news content, it limits its utility.
>
> The bare news event can be so misleading as to be false. For example, it is a customary editorial assumption that if an important man says it, it's news. But what if the important man says something that is essentially a lie? This happened often in the days of Herr Hitler and Doctor Goebbels. It happens nowadays, and not only in Moscow. If we print only the press association story of such a statement, we are flagrantly misinforming readers. It is not enough to catch up with the lie on the editorial page, a day or two later.
>
> We believe the balancing fact should be attached directly to the misleading assertion, if possible when it is published for the first time. We think this is more important than hasty headlines. So we do not hesitate to hold up a misleading story, until we can link with it the necessary fact. Our own correspondents are instructed to do this before they file the story in the first place.
>
> Thus newspapers must tell the meaning of the news. Rightly carried out, this function need entail no more editorializing than is involved, for example, when an editor decides to print one story and not another. But interpretation requires integrity and knowledge and understanding and balance and detachment.
>
> News interpretation, with all its hazards often is safer and wiser than printing bare news alone. Nothing can be more misleading than the unrelated fact, just because it is a fact and hence impressive. Background, motives, surrounding circumstances, related events and issues, all need to be understood and appraised as well as the immediate event.

You are at liberty to abbreviate in any way you choose these quotations from my article.

ERWIN D. CANHAM
*Editor, The Christian Science Monitor*
Boston, Massachusetts

[EDITOR'S NOTE: The misquotation to which Mr. Canham objects occurred in a letter published in our "Views of Our Readers" department in the March issue of the JOURNAL (38 A.B.A.J. 254). While the Board of Editors does not assume responsibility for matters stated or views expressed in any communication appearing in that department, they are glad to print Mr. Canham's letter setting forth what he actually said. The quotation has not been abbreviated and is published above as Mr. Canham sent it to us. Perhaps the misquotation is an example of one of the hazards of news interpretation to which Mr. Canham refers.]

## Takes Issue with Professor Brown

■ I refer to Mr. Ralph S. Brown's letter in the March, 1952, issue of the JOURNAL.

I don't know Mr. Brown's back-

ground, but it is obvious that in the sheltered cloisters of Yale University Law School . . . he has had little or no contact with the exigencies of day to day living in our disordered world or with the problems of inventors in the United States. This is strongly indicated by his acceptance at face value of the statement by E. O. Anderson in "Nationalization and International Patent Relations" in 12 *Law and Contemporary Problems* 782 (1947) that in the U.S.S.R.

> Research and professional invention is a select career and its practitioners enjoy above the average income, housing, food and clothing rations, and educational advantages for their children.

The foregoing article was written five or six years ago, and I doubt that Mr. Anderson or Mr. Brown ever had the opportunity to peek under the Iron Curtain to check the accuracy of the above-quoted statement. Moreover, even if the statement were true, how can anyone gauge the respective statuses of inventors in the United States and the U.S.S.R.? An "above average" income in the U.S.S.R., for all we know, might be equivalent to that of a delivery truck jumper in the United States, but even if an "above average" income was equivalent to ten times this, would this warrant the conclusion that the average U.S. inventor is receiving proper treatment at the hands of our Supreme Court? This is certainly extraordinarily specious reasoning for a man who presumably is a lawyer.

WILLIAM ISLER

Cleveland, Ohio

## Likes Mr. Richberg's Article on New Deal

■ On behalf of my fellow reactionaries, I want to welcome Donald R. Richberg to the fold. I only regret that in his interesting article "Should We Revive the Constitution?" (38 A.B.A.J. 35; January, 1952) he neglected to include the very pertinent remark of Chief Justice Hughes:

> If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government.

In that same case the Chief Justice also rebuked the Government for arguing that the statutory authority under review "must be viewed in the light of the grave national crisis with which Congress was confronted". In part the great Chief Justice replied:

> Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment. . . .

It is unfortunate that Mr. Richberg did not include in his exposé of the "now omnivorous federal powers" the misuse of the emergency concept. Incidentally the case I have quoted from is, of course, *Schechter* v. *United States,* 295 U.S. 495, at 546, and 528-9 – the N.R.A. "sick chicken" case; and the attorneys who argued the case for the government, Solicitor General (now Mr. Justice) Reed, and Special Assistant to the Attorney General Donald R. Richberg.

I believe Mr. Richberg is a true convert—like Jim Farley, Governor Byrnes, Dean Manion of Notre Dame, Jesse Jones, *et al.* However, I am reminded of the story told concerning Danville's first citizen, "Uncle Joe" Cannon. The ex-Speaker was once denouncing in his own inimitable style some of the Johnny-come-lately's of his day. His good friend, Senator Jim Watson, of Indiana, reminded him that as a Methodist he should believe in the doctrine of reformation of sinners. "Oh, I believe in that all right," replied "Uncle Joe", "I believe a prostitute should be allowed to confess her sins and repent; but I wouldn't want to go to church the very next Sunday and find her leading the choir."

JOHN W. UNGER

Palatine, Illinois

## Another View on Amendability of the Constitution

■ Anent your editorial statement in December that "the Constitution guarantees to the Communists the right to advocate an amendment of the Constitution to provide a totalitarian government for the United States", and without consulting one *Willoughby on the Constitution,* I venture to say that the power to advocate is unrestricted, but the power to effect a change in the Constitution by law is limited by a change coming within the terms of the meaning of the word "amendment". Obviously a proposition passed by the Congress and three-quarters of the states which amounted to a *revocation* of the Constitution could not be a legal *amendment.*

If it is really wise for the United States to engage in the imperial task of supporting the economies of the rest of the world, I could make out a good argument for a proposal to commit the allegiance of the American people and their officers to Her Majesty the Queen of England, whose ministers have so much more experience in imperial fol-de-rol than do ours. But even if we should pass such a measure according to the form required by the Constitution, it obviously would not be an amendment but a revocation.

What then are the limits of an amendment? I submit that they are additions, subtractions or alterations consistent with the declared purpose of the Constitution as set forth in its Preamble and if any proposition is probably inconsistent with the purpose of the Preamble, it is not a legal matter of Amendment.

MURRAY T. QUIGG

New York, New York

## The Test of Genius in Patent Law

■ We are indeed greatly indebted to The Right Honorable Sir Lionel Heald for his excellent and very helpful article entitled "Patent Law: The British Trend" appearing in the March, 1952, AMERICAN BAR ASSOCIA-

TION JOURNAL. Among the many pertinent comments in the article is the one to the effect that "patents being granted as a reward for practical achievements, not for mental exercises". This controversy has raged in the American patent law from the beginning under such phraseology as the "objective tests" which include the "practical achievements", and the "subjective tests" which are based upon "mental exercises" or what moves in the bosom of the Chancellor.

The objective tests, of course, include such factors as an existing need, prior efforts and failures and adoption after solution, whereas the subjective tests are, as the author indicates, merely "mental exercises". It has been exceedingly difficult for the laity to yield the right and privilege of the mental exercises to the evidence of achievement. During some periods of the American patent law the objective test theory has prevailed. *Expanded* v. *Bradford,* 214 U.S. 366, 381; *Wahl* v. *Andis,* 66 F. 2d 162, 165 (C.A. 7). Due to the recent tremendous advance of science and the present complicated nature of the subject matter of many patents, it has become wellnigh impossible to reach a conclusion on this subject by mental exercises in the time which a layman may devote to these subjects. It has, moreover, been impossible to establish a basis for invention by mental exercise which would cover the entire range of industries—for example, from those of the cobbler to those of the biochemist. A mental definition of invention which would reach the proper standards of the biochemist would eliminate the many useful inventions that are made in such arts as the cobbler's art. Sometimes it is more important to have an improvement in shoes than it is in biochemistry because more people wear shoes. After all, the achievements, or the objective tests, are of the nature of circumstantial evidence which has always been resorted to by courts in the absence of direct evidence. Since so often the lay court does not understand the subject matter there is for that reason just as an acute absence of direct evidence as if none had been submitted. Hence the resort to circumstantial evidence is but the following of a practice which has been current in all branches of the law since the beginning of the law. All attempts to devise a formula for invention through mental exercises have run into such definitions as the following:

Thomas A. Edison, whose authority in the premises cannot be denied, said: "Genius is 98% perspiration and 2% inspiration."

The cynical comment of Henry L. Mencken is also quite pertinent. Mencken said that genius was the "prototype of a dog who sniffs tremendously down an infinite series of rat holes". The public, of course, is more interested in and more benefited by what is yielded by the achievements of Mr. Edison's 98 per cent perspiration and by Mr. Mencken's tremendous sniffing than by the product of the mental exercises of those who are laymen in the sciences.

F. O. RICHEY

Cleveland, Ohio

# Make Your Hotel Reservations Now!

## 1952 Annual Meeting, San Francisco

## September 15-19, 1952—Headquarters—Palace

The Seventy-Fifth Annual Meeting of the American Bar Association will be held in San Francisco, September 15-19, 1952. Further information with respect to the schedule of meetings will be published in forthcoming issues of the *Journal.*

Requests for hotel reservations should be addressed to the Reservation Department, American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois, and should be accompanied by payment of $5.00 registration fee for each member of the Association for whom reservation is requested.

**Be sure to indicate three choices of hotels, and give us your definite date of arrival, as well as probable departure date.**

**Space is available in the following hotels: Alexander Hamilton, Bellevue, Beverly-Plaza, Californian, Canterbury, Chancellor, Commodore, Drake-Wiltshire, El Cortez, Fielding, King George, Manx, Stewart, Stratford, Sutter and Whitcomb.**

Detailed announcement with respect to making hotel reservations for members of the Association may be found in the January, 1952, issue of the *Journal.*

**All space not reserved by August 25, 1952, will be released to hotels on that date. Thereafter, reservations may be made by members with hotels directly.**

# Activities of Sections and Committees

## SECTION OF ADMINISTRATIVE LAW

■ There is widespread interest in the numerous bills which have been introduced in the Congress in an effort to overcome the effect of the *Wunderlich* decision, 342 U.S. 98, and confer upon the courts some power to review the decisions of contracting officers. The decision deals with the so-called "finality clause" in the standard form government contract. That clause provides for the finality of the decision of a department head appealed to in a dispute involving questions of fact. The *Wunderlich* decision establishes that in the absence of fraud all recourse to the courts is barred completely by the finality clause. By fraud, the Court declared, "we mean conscious wrong doing, and intention to cheat or be dishonest".

The Special Committee of the Section on Contracts of Lawyers with Indian Tribes has submitted to the Section its comprehensive report on a study of proposed regulations of the Secretary of the Interior covering the subject of contracts between lawyers and the tribes. (See publication of regulations in the *Federal Register* of August 11, 1951.) In its consideration of the problems presented by the regulations, the Committee's investigation extended over a period of seven months and conferences with interested parties included both lawyers and laymen. Guided throughout by the principle that the welfare of the Indian tribes must be the primary objective, the Committee recommended against issuance of the regulations unless they were modified in accordance with enumerated conclusions. Subsequent to the Committee report, Interior Secretary Chapman held a public hearing at which a representative of the Special Committee was heard along with other interested persons and groups. On January 24, 1952, the Interior Department announced that Secretary Chapman had concluded "not to issue the proposed new regulations". Modification of the existing regulations of 1938 will be considered as they appear to be necessary.

## SECTION OF INSURANCE LAW

■ The Section of Insurance Law participated in the Ohio Valley Regional Meeting held at Louisville, Kentucky, on April 9-12, by presenting a Panel on Trial Tactics, which turned out to be one of the great successes of the meeting. This Panel, which was arranged by Clarence W. Heyl, of Peoria, Illinois, former Chairman of the Insurance Section and presently representing the Section in the House of Delegates, attracted an audience of over 400 people. The participants were Lon Hocker, of St. Louis; Robert P. Hobson, of Louisville; Erwin W. Roemer, of Chicago; and Joseph H. Hinshaw, of Chicago. The Moderator of the Panel was Chief Justice James W. Cammack of the Kentucky Court of Appeals.

The Insurance Section also presented a series of papers on Friday morning, April 11. The speakers and their subjects were as follows:

Clifford A. Mitts, Grand Rapids:
"Owner's Liability for Injury to Contractor's Employees on the Premises"

William E. Knepper, Columbus:
"Limitation of Assured's Consent to Use of Automobile As Affecting Liability of Insurance Carrier"

James F. Moore, New York:
"Disability Benefits—Implications for the Legal Profession"

Frederick W. Kaess, Detroit:
"Exclusiveness of Remedy Provisions of Workmen's Compensation Laws"

Franklin J. Marryott, of Boston, Chairman of the Section, introduced Mr. Heyl at the Panel on Trial Tactics and presided at the meeting of the Section on April 11.

## SECTION OF INTERNATIONAL AND COMPARATIVE LAW

■ The International Law Committee of the Bar Association of the District of Columbia, in co-operation with the Committee on Coordination with State and Local Bar Associations of the Section of International and Comparative Law of the American Bar Association, is now prepared to offer an information service to international law committees of other bar associations.

The Bar Association of the District of Columbia is in a unique position to obtain documents and written material on foreign affairs from our Government, foreign embassies and various private organizations, and to maintain the liaison with worthwhile sources necessary to obtain current material promptly. Its International Law Committee has now assembled an "Initial Packet" of literature of various kinds dealing with current international problems, for distribution to other Bar Associations. The District of Columbia Committee takes no position whatever on the matters involved; and is prepared to distribute additional literature as time goes on and issues change, with a view to keeping the Information Service on international affairs current. It will also endeavor to answer special requests.

It is the hope of both the Amer-

ican Bar Association's Section of International and Comparative Law and the District of Columbia Committee that the availability of this information service will encourage those state and local bar associations which do not have an international law committee to form one; and that each of these new committees, as well as those already in existence, will write the District of Columbia Committee asking for the information service. It is available, including the "initial packet" of literature, without charge, except where expensive documents and special expenditures may be involved. It may be obtained simply by writing the International Law Committee, Bar Association of the District of Columbia, Washington Building, Washington, D.C.

## SECTION OF JUDICIAL ADMINISTRATION

■ The Louisville Regional Meeting gave the Section of Judicial Administration an excellent opportunity to inform the lawyers of the Ohio Valley region of what it is doing. A pretrial demonstration conducted by Judge Bolitha J. Laws, Chief Judge of the United States District Court for the District of Columbia, was received with great interest. There is room for a considerable extension of the use of pretrial conferences in the states represented at the meeting, and the Section has found through experience that a first step on this road is to acquaint the Bar with what the pretrial conference does and how it operates.

Another important phase of the Section's work is to secure the cooperation of laymen in bringing about needed improvements in the administration of justice. This was stressed in a program arranged by Judge Laws which was followed by reports from state committees of the Section in the area as to what was being done locally along lines of the broad objectives toward which the Section is working as long-range goals. Judge Emory H. Niles, of Baltimore, presided over this part of the session and excellent reports of progress were made by Charles S. Adams for Kentucky, by Richard P. Tinkham for Indiana and by Murray Seasongood for Ohio. Judge Harold R. Medina, the chairman of the Section, spoke at a crowded luncheon session of the meeting on "Judicial Administration and the Law Schools". This was the third in a series of addresses which he has been making covering the purposes to which the Section is dedicated.

At a meeting of the Council on February 24, a request from the Board of Governors for the views of the Council regarding a proposal of the Association's Committee on Professional Ethics and Grievances that there be established a committee of active or retired judges to consider problems arising from time to time involving the interpretation of the Association's code of judicial ethics was discussed. It was the sense of the Council that there should be no special or standing committee of active or retired judges to consider the problem of judicial ethics but it recommended that the By-Laws of the Association should be amended to enlarge the Committee on Professional Ethics and Grievances to include three judges.

## SECTION OF MUNICIPAL LAW

■ An important project of the Section of Municipal Law concerns one of the most vexing problems confronting municipalities today, the matter of parking facilities. In its initial study, the Section proposes to stress the administrative, legal and financial phases of the parking problem. It has enlisted highly qualified technical organizations to assist on this joint investigation.

Much has been written on parking, and it is not the intention of the Section to duplicate what has already been done. Rather, the intent will be to develop new areas of the problem. For example, the interrelationship of the parking problem with other aspects of the movement of persons and things will be explored. The metropolitan character of terminal facilities will also be delineated. The various methods of parking administration will be investigated, and parking authorities appraised. Considerable attention will be given to methods of financing parking facilities, particularly revenue bonds—one of the most recent and promising of methods. Parking meter financing will also be scrutinized, for there are some who believe that the parking meter fee can become to parking finance what the gasoline tax and registration fee have been to highway finance.

## COMMITTEE ON CUSTOMS LAW

■ The Committee on Customs Law has before it several pieces of proposed legislation which will affect the customs law practice and the rights of litigants in the Customs Courts. Among those bills are the following:

1. Customs Simplification Bill, so-called H. R. 5505, passed by the House and now pending before the Senate Committee on Finance, proposes to remove some of the outmoded barriers to trade, and contains many sound provisions, but it drastically alters the value basis for duty as well as the basis of currency conversion, and also fails to clearly preserve the right of the judicial review of administrative action as it now exists. Hearings before the Senate Finance Committee were scheduled to begin April 22, 1952.

2. H. R. 2641, a proposed new codification of the navigation laws has been the subject of considerable study, and on recommendation of the Committee on Customs Law the House of Delegates approved a suggested amendment thereto substituting the United States Customs Courts for the United States District Courts for review of navigation fees and tonnage taxes which are collected by the Collectors of Customs. The proposed amendment has been forwarded to the House Committee on Merchant Marine and Fisheries with the request that advice of committee hearings be given, and an

opportunity for a representative of the American Bar Association to appear and support the amendment.

3. The President under date of April 10, 1952, sent to Congress a Reorganization Plan No. 3 of 1952 which abolishes the offices of Collectors, Appraisers, Surveyors, and the Comptroller of Customs, and requires the functions of such offices to be performed by personnel to whom the Secretary of the Treasury delegates the functions formally vested in the abolished offices. It is doubtful whether this plan will result in real economies, and it may have grave consequences in connection with the presently established system of judicial review. Its complications require considerable study as this uprooting of established customs personnel in order to put it within the classified Civil Service seems fraught with considerable danger.

## COMMITTEE ON LAWYER REFERRAL SERVICE

■ The Standing Committee on Lawyer Referral Service has noted a strong trend toward the establishment of new referral plans within the last few months and believes the upturn to be attributable in large part to the National Referral Service Conference, which was held in Chicago on February 23. New services have been inaugurated in Flint and Muskegon, Michigan, Delaware County, Pennsylvania, and Stockton, California. In addition, plans are reported under consideration in New Haven and Waterbury, Connecticut; Buffalo, Binghamton and Nassau County, New York; Montgomery and Luzerne Counties, Pennsylvania; Miami and Jacksonville, Florida; New Orleans, Louisiana; Sioux Falls, South Dakota; and Eugene, Oregon.

## COMMITTEE ON AERONAUTICAL LAW

■ The Committee on Aeronautical Law is concerned with one of the most dynamic and constantly changing fields of law. The rapid expansion of aviation in recent years has brought about a rather serious lag in federal, state and local legislation to meet current needs of the industry and many of the problems under active consideration by this Committee are concerned with such legislation. The work of the Committee under the general chairmanship of Charles S. Rhyne, of Washington, D. C., has been organized as follows:

(1) *Consideration of Proposed Uniform or Model Acts on Financial Responsibility for Aircraft Accidents, Guest Act and Recordation of Aircraft Titles:* Madeline C. Dinu, Chairman; Calvin M. Cory, Robert K. Bell.

(2) *Airport Legal Problems:* Edward C. Sweeney, Chairman; William E. Miller, T. Julian Skinner, Jr.

(3) *International Conventions (Warsaw, Rome and Other Conventions):* Calvin M. Cory, Chairman; T. Julian Skinner, Jr., Palmer Hutcheson, Jr.

(4) *Civil Aeronautics Act, Civil Aeronautics Board and Civil Aeronautics Administration Developments:* Stuart G. Tipton, Chairman; Gibson B. Witherspoon, William A. Gillen.

(5) *State Jurisdiction Problems:* Robert S. Lindsey, Chairman; Palmer Hutcheson, Jr., Gibson B. Witherspoon.

(6) *Insurance Probems in the Aviation Field:* William E. Miller, Chairman; Edward C. Sweeney, Calvin M. Cory.

The Committee is now actively engaged in considering the problems growing out of the recent disasters in Elizabeth, New Jersey, and New York, New York. Special attention is being given to local safety regulations on low flying and to regulations establishing height limitations under zoning powers to eliminate obstructions adjacent to airports.

## COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES

■ In the early days of the Committee a great part of its time was taken up in hearing complaints of unprofessional conduct on the part of members of the Association. In recent years, however, it has apparently been recognized that this function is more efficiently performed by the local bar associations and very few complaints are lodged with the Committee. Such as have been brought have usually been either settled without hearing or referred to the local committees. The Committee's time, therefore, is devoted almost exclusively to answering questions from bar associations, members and others relative to the construction of the Canons.

## COMMITTEE ON JUDICIAL SELECTION, TENURE AND COMPENSATION

■ Practical methods of securing adoption of the American Bar Association plan for selection of judges were discussed at an open forum meeting sponsored by the Standing Committee on Judicial Selection, Tenure and Compensation, in Chicago, on Sunday afternoon, February 24, preceding the 1952 Mid-Year Meeting of the House of Delegates. Lawyers and judges who have been active in the campaigns for the adoption of this plan in states where the plan has been adopted, or has failed of adoption, reported on the methods used in their respective states, and the conclusions to be drawn therefrom. Complete minutes of the meeting, prepared by Glenn M. Winters, Secretary of the American Judicature Society, can be secured by writing to the Committee Chairman, Morris B. Mitchell, 1133 First National-Soo Line Building, Minneapolis, Minnesota.

The meeting also received reports that the bar associations of Illinois, Texas, Nebraska, New Mexico, Michigan and New York City were conducting active campaigns looking toward the eventual adoption of this judicial selection plan in their respective jurisdictions.

The widespread interest in this American Bar Association plan for selecting judges, as evidenced by the reports at the recent Chicago meeting, and the many advantages of this plan over the popular election of judges, make it seem probable that other states will gradually adopt it, and that it will eventually be the accepted method of selecting judges in most of the United States.

## COMMITTEE ON COMMERCE

■ The activities of the Commerce Committee so far this year have been confined largely to a consideration of the vexing question as to how far labor unions should be subjected to the coverage of the federal antitrust laws. The Committee secured the approval by the House of Delegates at its February meeting in Chicago of a proposed amendment to Section 1 of the Sherman Act, making labor unions responsive to the provisions of Section 1 where they engage in conspiracies in restraint of commercial competition. The Committee has also given considerable study to a very comprehensive measure prepared by Theodore R. Iserman, of New York, regulating the activities of labor unions. This measure is still under study by the Committee. Representatives of the Commerce Committee, acting jointly with representatives of the Section of Corporation, Banking and Business Law and the Section of Labor Relations Law, prepared amendments to a number of sections of the Labor-Management Relations Act of 1947, and secured approval of these proposed amendments by the House of Delegates at its Mid-Year Meeting. The Commerce Committee also submitted to the House of Delegates at its Mid-Year Meeting a report on Senate Bill 2522 (a proposed amendment to the Miller-Tydings Act) and this report was approved by the House of Delegates for transmission to the Chairman of the United States Senate Committee on the Judiciary.

## COMMITTEE ON MILITARY JUSTICE

■ It is apparent that there are elements in the Defense Department which are antagonistic to the reforms in military justice which have been accomplished during the past four years, and that only constant vigilance and determined championing of these and further reforms can prevent the recurrence of the evils in the administration of the court-martial system which caused so much public indignation during World War I and World War II.

The Navy's nomination of Admiral Nunn as Judge Advocate General of the Navy has led to the charge by Congressmen Sutton and Curtis that the Navy is seeking to circumvent the mandate of Congress that prior to appointment, the Judge Advocates General must have had no less than a total of eight years' experience in legal duties as commissioned officers. Unless Admiral Nunn's attendance at law school were to be included under the category of "experience in legal duties", he would not be eligible for appointment. Both the House and Senate Committees on the Armed Services in their reports on the legislation prescribing this qualification specifically stated that the years in attendance at law school were not to be counted as legal experience. For this reason, the Association's Committee will oppose the appointment and confirmation of Admiral Nunn as the Navy's Judge Advocate General.

## COMMISSIONERS ON UNIFORM STATE LAWS

■ The National Conference of Commissioners on Uniform State Laws, in entering its sixty-third year, can point with pride to its most recent accomplishment—the completion and promulgation, after ten years of study and work in conjunction with the American Law Institute, of the Uniform Commercial Code. Final unanimous approval was given to the Code at the New York meeting of the American Bar Association through action of the House of Delegates. The next step will be the presentation of the Code by the Commissioners to the state legislatures for passage in the 1953 sessions.

Under consideration at the present time and in varying stages of completion are proposed Uniform Laws covering a wide range of subjects. A committee of the Conference in conjunction with the American Bar Association's Commission on Crime in Interstate Commerce, is drafting a series of Uniform Acts on the Prevention of Organized Crime at the state level. These acts are to be in for presentation to the Conference at its meeting in September in San Francisco.

The Conference likewise has under study and draft, among other acts, a Uniform Adoption Act aimed at raising the standards of adoption procedure and practice, to curtail and prevent present antisocial practices in that field; a Uniform Certificate of Motor Vehicle Registration Act; a Uniform Rules of Evidence Act; a Uniform Rules of Criminal Procedure Act; a Uniform Aircraft Act; a Chattel Mortgage Act; a Uniform Act on Libel and Slander and the Right to Privacy, having in view the present-day developments in this field as a result of radio and television; and many other Uniform Acts. The work of the Conference is ever expanding. As an example, twenty-two proposed Uniform Acts were considered by the Conference Committee on Scope and Program between the September, 1951, meeting of the Conference in New York and the February, 1952, meeting of the Executive Committee of the Conference.

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Contributors to this department this month were as follows:

Sections—Administrative Law, Patricia H. Collins; Insurance Law, Franklin J. Marryott; International and Comparative Law, F. Trowbridge vom Baur; Judicial Administration, Will Shafroth; Municipal Law, Francis H. Lindley.

Committees—Customs Law, Albert MacC. Barnes; Lawyer Referral Service, Theodore Voorhees; Aeronautical Law, Charles S. Rhyne; Professional Ethics and Grievances, Henry S. Drinker; Commerce, Edward R. Johnston; Military Justice, Arthur E. Farmer.

Commissioners on Uniform State Laws, Martin J. Dinkelspiel.

**Social Security for Lawyers**
*(Continued from page 466)*

5. In the event of death, either before or after age 65, permit the bonds to be redeemed by the estate within a period limited to five years.
6. Require inclusion of the proceeds of the bonds in the gross income of the taxpayer or of his estate, as the case may be when redeemed, and exclude such bonds unredeemed at death from the estate tax.

### Mr. Goldstein's Plan Falls Short

Mr. Goldstein's plan falls short of the program advocated by this report, in that: 1. It is limited to professional persons and is not designed to assist everyone. If a plan is a desirable one, it should be available to all without class distinction. 2. No provision is made for contributions to such a fund to be invested in life insurance company contracts, particularly those with death benefits greater than the premiums deposited.

Mr. Goldstein's plan looks only to retirement and not to the continuation of a standard of living for a family deprived of a breadwinner by an early death prior to retirement. Many European countries have already excluded from income tax, certain premiums expended on life insurance company contracts. France, for example, frees from income tax such annual life insurance premiums as are not in excess of 10 per cent of the taxpayer's earned income, with a maximum of 40,000 francs for each household, plus 10,000 francs for each child. England permits 40 per cent of life insurance premiums to be deducted from income tax, limited, however, to an amount equal to 7 per cent of death proceeds and not to exceed 16⅔ per cent of the taxpayer's taxable income. The Netherlands approves a deduction for such a purpose of 600 guilders for single persons and 1,200 for married people, plus an additional 500 guilders for minor children. Denmark permits each taxpayer to deduct 400 kroner per year for such a program. Even West Germany allows a deduction from income tax of 800 marks for single persons and 1,200 marks for married persons for life insurance premiums paid.

3. It limits a man to those retirement benefits that can be created by 15 per cent of his net income, or $10,000.00, whichever sum is lesser. Admittedly, such benefits must vary greatly because of the many factors that affect net income. Is it not better to set a goal, such as 75 per cent of the average annual net income for a period of five years prior to retirement, and permit the exclusion from gross income of such sums expended to create such benefit? Only in that fashion can the maintenance of a high standard of living be guaranteed for an individual and his family.

On July 25, 1951, Senator Ives proposed an amendment to H.R. 4473 which, while pigeon-holed for the time being, is at least a step worthy of consideration. Senator Ives would exclude from the gross income of a taxpayer that portion of such taxpayer's earned net income contributed to a restricted retirement fund, not in excess of 10 per cent or $7,500, whichever is lesser. (A restricted retirement fund is defined as a fund set up by a bona fide agricultural, labor, business, industrial or professional association as a retirement plan for its members.) The trustee of the fund must be a bank, and contributions can only be invested in investments legal for trust funds. Distribution of such trust funds cannot, in general, be made before age 60, and when received or made available to a participant, will be taxable to him. If received in a lump sum, such distribution will be considered a gain from the sale or exchange of a capital asset held for more than six months.

Basically, Senator Ives' proposal is a good one. Its limitation of retirement benefits to those created by 10 per cent of a taxpayer's net income not in excess of $7,500 seems not to be the best standard of measurement as earlier brought out in discussing Mr. Goldstein's proposal. The right goal seems to be 75 per cent of the taxpayer's annual average net income for a period of five years preceding retirement, so that the law would permit the exclusion from that taxpayer's gross income of such sums as would be necessary to create such benefits. As we are starting from nothing, very likely we shall have to proceed towards our goal step by step.

The requirement that a trust fund be set up by a bona fide association can be criticized on grounds of abstract justice. For some persons without an association, or minority members within an association, it may prove to be harsh. Undoubtedly this restriction was put in to meet the Treasury's insistence that the administration of such new provisions be made as simple as possible. After more experience, it may be found that the restriction is not needed. It could then be deleted and strict requirements concerning permitted investments substituted therefor. Each individual could then set up his own restricted retirement fund without a trustee, by investment in life insurance company contracts or specially created government bonds.

Actually, so far as lawyers are concerned, the restriction should cause no trouble because the "bona fide association" will be their own bar association.

It is not generally realized that today an overwhelming majority of lawyers belong to some bar association. In the twenty-six states having "integrated" Bars, all lawyers belong. In other great states with "voluntary" bar associations such as Illinois, Iowa and Ohio, 80 per cent or more of all lawyers practicing in the state are members. Any lawyer on the payment of modest dues can join his local or state bar association unless he is in some trouble with the association's grievance committee.

Since social security and retirement plans are for the benefit of their members, bar associations can be counted on to endorse the principles of these plans and many have already done so.

At the American Bar Association's Annual Meeting in September, 1951, the House of Delegates (which represents approximately 140,000 lawyers in all states of the Union) voted:

> That the American Bar Association approve in substance the Keogh and Reed Bills, H. R. 4371 and H. R. 4373 respectively and the amendment of Senator Ives introduced on July 25, 1951, to H. R. 4473.
>
> That a copy of the foregoing resolution and the annexed report [of the Committee on Retirement Benefits for Lawyers] be sent to the President of the United States and to each Senator.

The President of the American Bar Association has written to lawyers urging their active support. His letter refers to "the manifest tax inequities of lawyers" and flatly states: "Saving for a lawyer's old age and family security is becoming nearly impossible under present and proposed tax rates."

Lawyers are so imbued with the fiduciary instinct and so accustomed to thinking in terms of benefits for their clients that they feel amost ashamed when they ask for anything for themselves even if it be only simple justice. It is worthwhile to remember that physicians and surgeons are in the same trap and subjected to the same discriminations. The American Medical Association has spoken out in no uncertain terms. Read "Income Tax Discrimination Against the Professions" in the April 29, 1950, issue of the Association's *Journal*. It is prepared to fight shoulder to shoulder with the Bar. Dr. Dickinson, its Director of Research, has participated in a symposium jointly sponsored by the Chicago Bar Association and the Chicago Medical Society.

The October, 1951, issue of *The Record of The Association of the Bar of the City of New York* contains an excellent statement issued by its Committee on Tax Relief for the Professions jointly with similar committees of the New York State and American Bar Associations.

Inasmuch as the foregoing relates only to retirement pension plans, it must be said again that this report to the Survey of the Legal Profession advocates *both* social security *and* retirement pension plans. The first is designed to guarantee, upon the retirement or death of an individual, a minimum standard of living as a matter of right to that individual or his family. The second is intended to give each individual a fair and equal opportunity to continue as high a standard of living as he can achieve through his own capacity.

With the adoption of these two programs, we not only would establish for everyone, without reference to his economic status, a minimum standard of living in the face of any primary economic risk, but we would assist each person to maintain for himself and his survivors, through his own efforts, a continuous standard of living close to that which he attained in his active years. Thus we would broaden the meaning of the term "social security".

The history of our country has been one of stupendous progress in social welfare and economic achievement. The standard of living has climbed continuously, until today we have far outstripped those countries in which freedom of individual initiative and enterprise is limited. Let us, therefore, continue to direct this progress in the path which our forefathers chose, and while assuming the responsibility of assisting those whom circumstances have placed in economic jeopardy, also give every opportunity for advancement to those more fortunate, who have the initiative and will to better themselves. In this fashion we establish social security for all, while preserving the heritage of this great nation.

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**Treaty-Clause Amendment**
*(Continued from page 470)*

of employing the treaty method in exercising this power, jurisdiction and sovereignty has been negatived by the long established practice of the Federal Government.

To Congress is specifically delegated the power to declare war, but not to make peace. The constitutional power of Congress to end a state of war by joint resolution is no longer open to question. When the Treaty of Versailles failed of approval by the Senate in 1920, Congress ended the state of war with Germany by a joint resolution approved by President Harding on July 2, 1921. The war with Austria was ended in the same manner. In both cases treaties were eventually concluded with those governments, but they could not have retroactive effect to confer legislative power on Congress. Again as recently as October 19, 1951, the President approved a joint resolution terminating the state of war between the United States and Germany, declared by Congress following the attack on Pearl Harbor, 65 Stat. 451. Up to the present writing no treaty of peace has been concluded with Germany. Nevertheless, our state and federal courts will be bound to give full force and effect to the joint resolution in all cases coming within their appropriate jurisdictions.

When the treaty of April 12, 1844, for the annexation of Texas was not advised and consented to by the Senate, the annexation was accomplished by a joint resolution of March 1, 1845, 5 Stat. 797. Hawaii was annexed by the United States by a joint resolution of July 7, 1898, 30 Stat. 750, when it became evident that the treaty of annexation signed June 16, 1897, would not be approved by the Senate. Notwithstanding the rejection of the Treaty of Versailles by the Senate in 1920, Congress by joint resolution of June 19, 1934, 48 Stat. 1182, authorized the President to accept membership in the International Labor Organization established under Part XIII of the Versailles Treaty.

Beginning with an Act of February 20, 1792, 1 Stat. 239, Congress has authorized the Postmaster General to make postal arrangements with foreign countries without any requirement for submission to the Senate; a National Quarantine Law was enacted in 1878, 21 Stat. 37, under which subsequent sanitary conventions were enforced; an Act of Congress of February 9, 1922, au-

thorized the World War Foreign Debt Commission to conclude agreements with foreign countries subject to the approval of the President and Congress but not subject to ratification by the Senate.

> The delegation by the Constitution to the President and the Senate of the power to make "treaties" does not exhaust the power of the United States over international relations. The will of the nation in this domain may be expressed through other acts than "treaties". . . . There is no inconsistency between the authority of the President and the Senate to regulate foreign relations through agreements in the form of "treaties" and the power of the President and Congress to deal with matters of foreign policy through legislative action. Which of the two procedures shall be employed in a given case is a matter of practical convenience or political expediency rather than of constitutional or international law. ["Acts and Joint Resolutions of Congress as Substitutes for Treaties", by James W. Garner, *American Journal of International Law*, 1929, pp. 482-488; see also "Constitutional Procedures for International Agreement by the United States," Charles Cheney Hyde, in *Proceedings* of American Society of International Law, 1937, pp. 45-55, and "Enforcement of Administrative Treaties in the United States," by Henry Reiff, *American Journal of International Law*, Vol. 34, pp. 661-679].

Fears that the adoption of the proposed constitutional amendment would deprive the United States of the power to conclude treaties for the mutual surrender of fugitives from justice are grounded in an inadequate understanding of the history of extradition in this country. At international law treaties are not required. Extradition is founded on reciprocity.

The Constitution provides for the delivery of fugitives between the several states (Article IV, Section 2) but the question whether the power of international extradition was vested in the states or the Federal Government was long in doubt. The Jay Treaty of 1794, stipulating for extradition for murder or forgery, expired in 1807. For the next thirty-five years the United States had no treaty relations on extradition. During that period the Federal Government declined to act upon requests of the states to apply to foreign governments for the surrender of fugitives, and it referred to the states for their action the requests of foreign governments for the delivery of fugitives found therein. The President and Secretary of State held that they lacked power to act for the nation in matters of international extradition in the absence of treaty *or* Act of Congress. New York State adopted an act in 1822 conferring power upon its Governor to act internationally. It remained in operation until 1839 when Governor William H. Seward, later Secretary of State in President Lincoln's Cabinet, declined to act under the state law, on the ground that international extradition was "intimately connected with the foreign relations of the United States, and should be exclusively under the control of the General Government". Moore, *Digest of International Law,* Volume IV, 242. In the same year the Governor of Vermont issued a warrant for the surrender of a fugitive to Canada. On a writ of *habeas corpus* the case reached the Supreme Court of the United States, which declared that the power of extradition belonged "exclusively to the Federal Government", and that the action of the Governor of Vermont was "repugnant to the Constitution of the United States". *Holmes* v. *Jennison,* 14 Pet. 540 (1840). See the full discussion of this case by John Bassett Moore in *Treatise on Extradition* (1891) Volume I, pages 55-59. The following year the United States concluded an extradition treaty with Great Britain and another with France in 1843.

The first federal extradition statute was adopted in 1848. Its purpose was to regulate extradition procedure in the United States and put the surrender of fugitives to foreign governments on a completely reciprocal basis. It was made applicable to extradition treaties already concluded and to future treaties.

In view of this history, it would be overemphasizing the importance of treaty-making in American constitutional law to hold that Congress would not have the power to enact legislation making extradition treaties internal law under the proposed constitutional amendment. President Lincoln, with Mr. Seward as his Secretary of State, surrendered a fugitive to Spain in 1864 in the absence of a treaty with that country. Mr. Seward defended the President's action in a letter of June 24, 1864, to the Chairman of the Judiciary Committee of the House of Representatives. He asserted that "the true position of the national obligation and authority for the extradition of criminals" may be found "defined and established by the law of nations" and that "this obligation and authority, under the Constitution of the United States, and in the absence of treaty stipulations and statutory enactment, rests with the President of the United States". *Arguelles Case,* Moore, *Digest of International Law,* Volume IV, pages 249-250. It is common practice of the Department of State to request the surrender of fugitives by governments with which we have no extradition treaties. Judge Moore, the most distinguished authority on the subject, says: "In the United States the general opinion has been, and practice has been in accordance with it, that in the absence of a conventional *or* legislative provision, there is no authority vested in any department of the government to seize a criminal fugitive and surrender him to a foreign power." Judge Moore's reference to a *convention* or *legislation* as alternative provisions has been emphasized by the writer.

Similar fears have been expressed that the adoption of the proposed constitutional amendment would prevent the United States from entering into so-called treaties of judicial assistance because Congress would lack power to legislate in the absence of such treaties. The House of Delegates of the American Bar Association on September 20, 1950, adopted a resolution urging the appointment of a presidential committee to draft treaties and take other advisable action "to codify

and improve international procedures in civil and criminal matters. 75 *A.B.A. Rep.* (1950) page 120. The report of the Committee on International Judicial Co-operation of the Section of International and Comparative Law, submitted to the last Annual Meeting of the Association at New York in September, 1951, stated that "The Departments of State and Justice have approved the recommendation in principle. . . . However, substantial progress with a plan of organization has been made."

The amendment to the Constitution now recommended by the American Bar Association would not have any effect upon the power of Congress to legislate on this subject in the absence of a treaty, certainly so far as the federal courts are concerned. Federal legislation of this nature is already on the statute books in Title 28 of the United States Code. If it was the intention of the Association's resolution of September 20, 1950, to include state courts within the mutual advantages and obligations of the suggested treaties, any constitutional difficulties might be overcome by drafting the treaties on a reciprocal internal state basis. That is the regular procedure in Great Britain, which does not undertake to enforce treaties affecting the laws of the dominions, colonies, possessions or protectorates without their consent. A uniform reservation to this effect is inserted in British treaties of this character. Phraseology typical of such reservations was embodied in the Draft Convention Relating to Civil Procedure Prepared by the Committee Appointed by the Lord Chancellor in 1919. It reads:

> This convention shall not apply to any of the Dominions, Colonies or Protectorates of either contracting party; but either contracting party may at any time give notice of accession to this convention on behalf of such Dominion, Colony, Possession or Protectorate, and this convention shall accordingly apply to such Dominion, Colony, Possession or Protectorate on the expiry of six months from the date of such notice. Any Dominion, Colony, Possession or Protectorate on behalf of which such notice has been given may withdraw from this convention on giving six months' notice. [Harvard Research Draft on Judicial Assistance, printed in *American Journal of International Law,* Supplement, Volume 33, page 143].

Similar reservations are attached to British treaties involving criminal law. They cover such subjects as extradition, circulation of obscene publications, traffic in women and children.

Judge Manley O. Hudson, in discussing extradition treaties in the municipal law of federal states, contends that the principle of internal state reciprocity prevails in applying the requirement of double criminality. "If it be admitted that the act charged must have been made criminal by the law of the requesting state, it would seem to be important, on general principles, apart from their application in particular treaties, that this should be the law prevailing in that part of the territories of the requesting state in which the accused will be tried if surrendered. . . . A long course of action by the governments and a fairly consistent course of decision by American and British courts are to this effect." He adds: "A similar problem arises in various European states, which, if not strictly federal states, have nevertheless different systems of criminal law in different parts of their territories. Hence, statements of the principle of double criminality made in treaties include not infrequently a specification as to the law of the particular part of the national territory which may be involved." (Manley O. Hudson, "The Factor Case and Double Criminality in Extradition", 28 *Am. Jour. Intl. Law* 274, at 286-287 (1934).)

Predictions of the supposedly harmful effects that might follow the adoption of the proposed amendment at the present time are predicated upon speculation as to the unfortunate consequences that might have resulted for the nation in its infancy had the treaty supremacy clause not been incorporated in the Constitution to prevent the states from confiscating the British debts in violation of the stipulation to this effect in the Treaty of Peace of 1783. It is conceded that this was the principal purpose of the clause. The fallacy of the speculative argument is demonstrated by what actually happened to the payment of the British debts under the clause. "The fact that some of the States, either before or after the coming into effect of this provision, did obstruct the collection of debts due to British subjects during the war, made it necessary for the United States, some years later, to enter into an arrangement with Great Britain for the settlement of the debts directly between the two nations." (Edgar Turlington, "Treatment of Enemy Property in the United States before the World War", 22 *Am. Jour. Intl. Law* 274 (1928). Writing on the same subject, John Bassett Moore said that the decision of the Supreme Court holding the state confiscatory statutes to be invalid (*Ware* v. *Hylton,* 1796, 3 Dallas, 199) under the treaty supremacy clause was "of little benefit to the creditors. Owing to lapse of time, and to intervening deaths, financial failures and loss of proofs, the judicial remedy against the debtors had become practically worthless; and, under a treaty signed on January 8, 1802, the United States paid Great Britain the sum of £600,000, or $3,000,000, with which to compensate the creditors for their losses." *International Law and Some Current Illusions* (New York: The Macmillan Company, 1924) 14-15. The principle of the immunity from confiscation of private enemy property on land, including debts, has been abandoned in the peace treaties and most of the national legislation on the subject following the two World Wars.

This article in support of the constitutional amendment proposed by the American Bar Association is not intended to be in any sense an argument against the proper exercise of the treaty-making power of the United States, or to advocate the use of alternative methods in the conduct of our foreign relations. It is intended to demonstrate that Congress would have the power to enact legislation to make effective as in-

ternal law treaties on subjects of external regulation over which the Federal Government is vested with power to represent the states. Upon the adoption of the proposed amendment, the Congress, and not the treaty-making power, will determine whether the terms of the proposed treaty should be binding upon the states without their consent. Such questions will be restored to their proper sphere of decision under the Constitution of the United States in which foreign nations have no proper concern. It will make it impossible for the courts or the treaty-making power to ignore the spirit of the general reservation contained in Article 2, Paragraph 7, of the Charter of the United Nations that nothing contained in it shall authorize intervention "in matters which are essentially within the domestic jurisdiction of any state".

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**The White House and the Vatican**
*(Continued from page 474)*

Prior to the adoption of the Fourteenth Amendment, the First Amendment, as we have said, did not apply as a restraint against the states. While most of the states did early provide constitutional protections for religious liberty, some states, as the Court remarked in the *Everson* case, "persisted for about half a century in imposing restraints upon the free exercise of religion and in discriminating against particular religious groups"; citing in a footnote North Carolina and Maryland. And then in an exegetic eruption the Court says:

> The "establishment of religion" clause of the First Amendment means *at least* this: Neither a state nor the Federal Government can set up a church. *Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.* Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs, or disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of *Jefferson*, the *clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."* Reynolds v. United States, supra (98 U.S. at 164, 25 L. ed. 249).

Justice Rutledge who wrote the dissenting opinion with which Justices Frankfurter, Jackson and Burton agreed, outdoing the majority in the way of exegesis, declares that the object of the First Amendment was not merely to strike at the official establishment of a single sect, creed, or religion, "outlawing only a formal relation such as had prevailed in England and some of the colonies". "The object", Rutledge said, "was broader than separating church and state in this narrow sense. *It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.*"

We know the skill displayed by Serjeant Buzfuz in extracting significant hidden meanings from Mr. Pickwick's "chops and tomata sauce" but without the artful aid of exegesis even he could not find in the plain and lucid words of the First Amendment the meanings which are marked for emphasis in the foregoing quotation from the *Everson* opinions.

We need not here discuss the validity of the logic by which Justice Rutledge, substituting his own views and those which he attributes to Madison and Jefferson, for the plain words of the First Amendment arrived at this intent of the language of the First Amendment which, he says, "was broadly but not loosely phrased" and, like the bill that Jefferson piloted through the Virginia Assembly, is a "Model of technical precision and perspicuous brevity". It is enough here to say that Justice Rutledge has given to the language of the First Amendment, this model of technical precision and perspicuous brevity, the "broadest" extension possible to misconception buttressed by wide and immaterial research.

The *McCollum* case involved the use of room in a tax-supported public school, and by permission of the school authorities, for religious instruction of public school pupils, released from their regular school studies for that purpose and by written request of the parents. Instruction was given by Protestant teachers, Jewish rabbis, and Roman Catholic priests to pupils belonging to their respective faiths. No student was required to subject himself to any such instruction.

The Court, by Justice Black, held that this was a utilization of the tax-established, and tax-supported public school system to aid religious groups to "spread" their faith. "And", said the Court, "it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth,) as we interpreted it in *Everson* v. *Board of Education*, 330 U.S. 1, 91 L. ed. 711, 67 S. Ct. 504, 168 A.L.R. 1392."

The Court then quoted from its opinion in the *Everson* case in which the Court said, among other things, that "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." The four dissenting judges in the *Everson* case had said that "Legislatures are free to make, and courts to sustain appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small." In the *McCollum* case, the Court, after quoting from the minority opinion in the *Everson* case, said that both the majority and minority in the *Everson* case, "agreed that the First Amendment's language, *properly interpreted*, had erected a wall of separation between Church and State".

Justice Frankfurter delivered a concurring opinion in the *McCol-*

*lum* case in which Justices Jackson, Rutledge and Burton joined. Justice Reed wrote a dissenting opinion.

The phrase "wall of separation between church and state" first appears in a letter of Jefferson written early in 1802 to a group of Baptists in which he refers to the First Amendment, quoting it. He did not extend the application of the phrase beyond the plain letter of the amendment which declared that Congress "shall make no law respecting *an* establishment of religion, or prohibiting the free exercise thereof", "thus", as Jefferson said, "building a wall of separation between church and state". He was merely commending the prohibition against setting up a state religion. He was against setting up a church and against *preferring* one religion over another by any form of aid. Of course this phrase in a letter is not part of the First Amendment. Jefferson, in speaking of a "wall of separation" was referring only to what the First Amendment referred to: prohibition of the establishment of *an* official church. But this rhetorical "wall", greatly enlarged and extended, has been built into the First Amendment by the Slave of the Lamp of Jurists, the potent genie, Exegesis.

### American Tradition Is Contrary to Rutledge's Views

The tradition and practice of the United States Government, as I think has been demonstrated, has been from the beginning contrary to Justice Rutledge's views as expressed in his opinion and contrary to the views expressed in the *McCollum* case. And still the chaplains serve in the Army and Navy and sessions of the houses of Congress are opened with prayer.

However, and notwithstanding what has been said here about the *language of opinions* in the *Everson* and *McCollum* cases, the purpose of this discussion of them is to show that, taking the extremest of such language, none of it, in either court opinions, concurring opinions, or dissenting opinions, goes so far as to support a contention that to send an ambassador from the United States to the Vatican would be a violation of the First Amendment, either as it is written, or as it has been rewritten by being "properly interpreted".

In no sense can the accreditation of an ambassador to the Vatican be colored by exegesis into an act giving any church or religion directly or indirectly any sort of preferential treatment or financial support. No question of civil rights is involved. The ambassador, if sent, will go to serve the interests of the United States, not those of the Papacy or the Catholic Church, here or abroad. There has been no indication, perceptible to this writer, that the project was urged upon the President by Catholic influence. Of the 28,634-878 Catholics in the United States, according to the recent church census, few have been vocal about the appointment and few have exhibited the slightest interest in the matter. They are so indifferent that the vehemence of the protests from some other religious bodies surprised and dismayed them as a recrudescence of smoldering sectarian animosities that seemed to have grown cold. So far as *they* are concerned the maintenance of an ambassador to the State of Vatican City means little or nothing unless it will be of real service to their country, the United States of America.

It may be said that the embassy would be really to the head of a religion, thus giving "recognition" to that religion. But "recognition" by the extremest exegesis of the First Amendment is not prohibited.

In *Mahoney* v. *United States*, 10 Wall. 62-68, 19 L. ed. 864 at 865, the Court, by Justice Field, remarked that "A great distinction has always been made between consuls to Mahometan and consuls to Christian countries, both in the powers entrusted to them and in the duties with which they are charged", and he adds, "express stipulations [*i.e.*, in treaties] are made for the enjoyment by our citizens of certain extraterritorial rights with respect to their persons and property".



Here is distinct recognition of the religion of another sovereignty. Will any one assert that it breached the figurative wall between church and state in this country?

We send ambassadors to various heads of religions. The Queen of England, for instance, is the head of two established churches: the Church of England and the (Presbyterian) Church of Scotland; a situation possible only to the eminently practical British. With respect to the Church of England the reigning sovereign is by law its supreme governor in things spiritual and temporal and has the right to nominate bishops to vacant sees.

The United States sends diplomatic representatives to Sweden, Norway and Denmark. In Sweden, the king is the supreme head of the Lutheran Church. In Norway, the state religion is Evangelical Lutheran. The king, who must conform to the state religion, nominates the clergy of the established

church. In Denmark, the Lutheran religion, also called Evangelically Reformed, is the official religion of the state. The king must profess the state religion. The bishops receive salaries from the state and the parish clergy are supported by tithes.

True, the Pope is more of an ecclesiastic than those other sovereigns but that does not impinge on the First Amendment even under exegesis. He is still a temporal sovereign. The *size* of the territory governed cannot be a determining factor. This country maintains a minister in Luxemburg, in which the population is almost entirely Catholic, and which is only about thirty-one miles square: 1000 square miles in all; far smaller than most counties in this country. In fact the United States has accredited diplomatic officers to agencies which govern *no* territory in a sovereign capacity, such as the United Nations in New York City, and the North Atlantic Treaty Association (NATO) to which a full time ambassador has been recently assigned.

As Edward S. Corwin, McCormick Professor Emeritus of Jurisprudence at Princeton University, said in a recent article in the *New York Times,*

> If, as the Supreme Court has held, a State is entitled to pay for the public transportation of children attending parochial schools in order to assure their safety on the highway, notwithstanding the fact that in doing so it aids such schools, then certainly the President is entitled to bolster our precarious European diplomacy by sending an Ambassador to the Vatican, notwithstanding the fact that the separation principle is not considered by some of our citizenry as forbidding them to mix religion with their politics.

**The Joker in the Constitution**
*(Continued from page 478)*

than with vinegar. See later the Welfare View.

### Less Radical View

This view, though radical, is less radical than the former. Although the tax clause is a separate and independent power and fixes its own ends, it must be remembered that those ends must not be used where there is also a definite or specific power. If Congress could reach the same end by means of the commerce clause, it would be required to exhaust its commerce authority before it could invoke the authority providing for the general welfare. You can as a last resort use the tax power for a national public matter if the other powers are inadequate. This view, however, for the purposes of this article, is not important.

### The Conservative View

The conservative view is a reasonable expansion of the restrictive view. It was accepted in the AAA decision, called the *Butler* case. Six of the Justices were of the opinion that the words *general welfare* referred to the *entire document* as the scope of the Constitution and not merely to the other seventeen powers. This, of course, opened the gate to squeezing, swelling and exaggeration and to that extent enlarged federal authority. It is, however, based on the principles of interpretation propounded by Madison, Monroe and Story. It treated the tax clause and the sweeping clause as implemental powers only. The tax power, like the sweeping clause, was given to the Federal Government to enable it to perform all its other broad and comprehensive constitutional duties. It was not an end in itself, without relation to the rest of the Constitution, but was a powerful and convincing *means.*

To look at it, however, through the eyes of Hamilton, even though the tax power names its own objects and is not limited by the other direct grants, it is a *revenue* power only for *the support of the Government* and is, therefore, confined to constitutional authority, on account of the commonly accepted definition of *a tax.* This recognizes the fields reserved by the Tenth Amendment to the states as *holy ground.* In the AAA the Court reached the conclusion that, although the tax clause named its own ends: *debts, defense* and *welfare,* it could not invade such fields as agriculture, which had been reserved to the states, to control and regulate them. And here is where Madison and Hamilton met on common ground, although they reached it going in opposite directions; and here also is where the inspiration contained in Justice Stone's dissenting opinion, as well as in the indicative majority opinion, found a refuge in the heart of the New Deal and Welfare View.

### Welfare View

This interpretation was first suggested by the *Butler* decision. Justice Stone held out in his dissenting opinion this same idea in more brilliant plumage. The New Dealers grabbed it as a compromise or solution to the agricultural problems of the depression. And then extended it to all quarters. They agreed that *the power* to control agriculture, local industry, education and the like, was *the thing reserved* to the states by the Tenth Amendment. The subject matter itself was not reserved, only the regulation thereof, and the tax clause authorized appropriations in aid of agriculture for the general welfare. It can be done by *subsidies only—not by subsidies and penalties.* This inspiration was not without some foundation. The Tenth Amendment reserves the *powers* not delegated to the Federal Government. The *Butler* case construed this to mean that the subject matters were reserved to the states, because the powers which expressly referred to certain subject matters and were delegated, in no way referred to other subject matters. But it also held that the *subjects* were not reserved beyond the reach of *aid* under the granted power.

### Administration Heeds Court's Suggestions

The Administration jumped at Roberts' and Stone's suggestions that, without attempting to regulate the

subject matters, Congress could give monetary aid to the subject matters of agriculture, education, domestic affairs, intrastate commerce, mining, manufacture and all other fields of endeavor not referred to in any of the other specific grants of power, provided Congress deemed financial assistance necessary for the general welfare of the United States. After a fashion Hamilton, Monroe, Story and the Supreme Court approved this view. But until Stone came along, with Brandeis and Cardozo, they all concurred that such expenditures (permissible under the tax clause) were confined to the support of the Government. Such was the meaning of the word *tax*. It did not include vast subsidies for relief, regulation and federal control.

One thing, however, is certain: All these views are entirely consistent with the Tenth Amendment. If either Radical View is correct, nothing is reserved to the states. If the Welfare View is correct, little is reserved to the states. If the Restrictive View is correct, much is reserved. If the Conservative View is correct, something at least is reserved. But no matter which view is correct, the reservation varies indirectly with the grant. The less the delegation the greater the reservation. The greater the delegation the less the reservation. This undoubtedly is a joker. A sea of uncertainty. No Man's Land. Since 1936 the joker has been absolutely wild. It alone has almost destroyed the sovereignty of the states. It has enlarged the sovereignty of the Federal Government, under federal interpretation, from a life estate to a fee simple.

The Administration contended that the AAA was a lawful exercise of the tax power to provide for the general welfare of the United States by curtailing productions and raising prices by a system of subsidies and fines. The *Butler* case said that Congress could not do this to agriculture, as it regulated it, and as it had been reserved to the states. Stone, Brandeis and Cardozo disagreed. They said *agriculture has not been reserved to the states,* but *only the power to regulate it.* The Court replied the AAA levy was not a *true tax,* as it was not *for the support of the Government,* or not within the scope of the Constitution. But Stone, Brandeis and Cardozo contended, "You can't tell me that Congress can't spend tax money to aid and assist agriculture."

The *Butler* case, it seems, repudiated the Restrictive View, the Radical Views, and confused the Conservative and Welfare Views. One can hear the resounding clashes, violent discrepancies, inconsistent theories and paradoxical statements. And it settled nothing except that agriculture was a common playground to the states and to the United States.

But the decision in the Second AAA accepted the interpretation of Stone, Brandeis and Cardozo, and clothed the Federal Government with power and authority to destroy the sovereignty of the states with these soft and terrible words *general welfare of the United States.* The broad and ample power to spend billions for the benefit of any group, enterprise, field of endeavor, or other purpose whatever was recognized.

Under the decision of the Supreme Court in subsequent cases, Congress is now at liberty to use the taxing power—to exercise it for ends inconsistent with the limited grants of power in the Constitution. It can play agriculture as a musician plays an accordion.

What it can do with agriculture, it can do with education and domestic relations, not to speak of such cold-blooded matters as manufacture, business and mining. Historically the Welfare View seems wrong. Logically it is available to constitutional interpretation.

### Patrick Henry Foresaw Danger

Patrick Henry foresaw that, after America had outgrown its historical setting, some unusual leader, in some unusual circumstance, might fascinate Congress into passing bills requiring the Radical or Welfare View of the tax clause, if not even the two-power view, and might then pack the Supreme Court with immature and unestablished minds to hold the acts valid. This embodiment of liberty was also a prophet.

While historically wrong, the joker clause is, within itself, susceptible of the broad, independent construction that has been placed upon it. As a result, state sovereignty is just as big or just as little as Congress wants it to be. There is nothing to prevent the Congress, by means of taxation, from bleeding every citizen of America of every dollar he has and spending it, under the guise of general welfare, in aid of agriculture, education, mining, man-

ufacture, intrastate commerce, the professions, domestic relations and even the labor unions and all other groups they might desire to help. Already it collects over forty billion a year from private income payers and gives away even more. (David Lawrence's column, July 14, 1949.)

There is no sound basis, I think, for the claim that there is a sound distinction between the reservation of agriculture and the reservation of the power to control agriculture. A government has nothing but power. The power to regulate agriculture necessarily implies that agriculture is reserved to the states. The power depends upon the subject matter. The High Court has, however, in the *Butler* case, in spite of its statements therein to the seeming contrary, removed all matters from the *exclusive* sovereignty of the states. The significance of the word *tax* has completely vanished. It is no longer "an exaction for revenue only".

But the Court, without any necessity for doing so, executed a column right and decided the Second AAA on the interstate commerce clause instead of the tax clause.

*Mulford* v. *Smith*, 307 U. S. 41, held crop control a valid exercise of federal authority to control interstate commerce. The language of Mr. Justice Roberts is amusing and symbolic: "It purports to be solely a regulation of interstate commerce, which it reaches and affects *at the throat* where tobacco enters the stream of commerce,—the marketing warehouse." The Court, in the *Butler* case, defeated state sovereignty with its left hand. In the *Mulford* case it knocked it out with its right. In both cases the Court has held that no subject matter belongs solely to the states; that every subject matter is within both the grant and the reservation; that nothing is unaffected by federal authority—that there isn't any No Man's Land; that it can *provide* under the tax clause and *prevent* under the interstate commerce clause. All this and more, too, in spite of the fact that agriculture is truly reserved to the states.

If a limit can be placed on the amount of tobacco a farmer raises, under a promise of premium; and a limit on the amount he can sell, under pain of penalty; Congress can limit both the beginning and the end of production; and the difference between intrastate and interstate commerce becomes a mere matter of desire. What is true of agriculture may by mere construction be made true of mining, manufacture, education, merchandising, preaching and domestic relations, silly as that may seem. The *Butler* case made agriculture the object of federal care, subject to subsidy. The *Mulford* case made it interstate commerce, subject to penalty. If this is interstate commerce, my driveway is a post road. Neither premiums nor penalties are repugnant to the Tenth Amendment. What is true of the interstate commerce clause is equally true of the other definite powers. So agriculture and all other matters are in reach of the federal left hand; while controls of such matters are within reach of the federal right hand. Nothing is beyond the grasp of both hands. Since the word *tax* has lost its narrow meaning, why need the Federal Government go around the house to come in the front door? Hadn't it just as well have sustained the first AAA? And why not the NRA if re-enacted on the same premium-and-penalty basis? Can't it control property and persons right out of Washington? Nothing under the "New" Constitution can escape the shadow of the express grants. The decisions of the Supreme Court in the *Butler* case, the *Mulford* case, the *Duke Power Company* case, the *Alabama Power Company* case, the *Social Security Case*, the First, Fifth and Fourteenth Amendment cases, too numerous to cite, have firmly established Federal Socialism or a *welfare state*. Thanks to the jokers in the Constitution, particularly the tax clause and the interstate commerce clause, a classic example of federal encirclement. The principles that sustained Mr. Justice Butler, Mr. Justice McReynolds, Mr. Justice Sutherland and even a fractional part of Mr. Justice Roberts, have been buried in the litter of history and in the same grave with state sovereignty. New principles have taken the stage.

A Department of Agriculture, a Department of Education, a Department of Public Health, a Department of Civil Rights, a Department of Professions and Salaries, and ultimately a Department of Religion (*Everson* v. *Board of Education*) all authorized under the socialistic Welfare View of the tax clause. The ruling passion is security. The ruling power is politics. Security is a great leveler. It consumes all it aids and then dies.

The First and Fifth Amendments, intended as bucklers for the states, have been turned into swords in the hands of the United States, while the Fourteenth Amendment has disarmed the states against federal invasion. The Federal Government is now, indeed, the head of the house; with almost unrestricted paternalistic authority, and it is all, in its strained and mysterious way, based on constitutional authority.

### Socialism Abolished or Sovereignty Regained?

There are four ways theoretically by which the states may regain their sovereignty and revoke the Welfare State.

(1) The Supreme Court could reverse the decisions establishing our Welfare State and go back to 1932. This will not be done. A road which turns back over the same ground is a dead-end street.

(2) Congress could repeal the New Deal laws setting up our welfare state. This will not be done. Whenever a constitutional government becomes inflated with benevolence and defeats the sovereignty of the states, it has created a national power under the guise of general welfare, which it cannot resist. It has taught its people that promises of security are better currency than independence and liberty; and they fail to see the sovereignty of the states lost in the sovereignty of the Nation. Congress cannot turn back. The people will not permit it.

(3) Congress and the people could restore sovereignty to the states by expressly repudiating the Welfare View of the general welfare and expressly limiting the Conservative View to other congressional powers or the support of the government and restoring the original interpretation of the interstate commerce clause.

Never will this be done on account of the urge of nationalization and the lure of subsidies and security.

(4) What then can be done to avoid riding the tide to totalitarianism?

We must learn that our Senators and Congressmen are representatives of the states, or the people, respectively, and are not representatives of the Federal Government. The Federal Government has representatives primarily in foreign relations. The Federal Government *is* the representative of the states, by the states, from the states and for the states. They compose the Federal Government. As such they can pipe the sovereignty of the United States back through the federal heart to the states whence it came, let them retain the peacetime controls, and thus hold the line against a federal rout.

And why not? That sovereignty referred to is nothing more or less than the taxes collected from the people back home. It is the very life blood of industry of every sort. It is the health and prosperity of the citizens of all the states. And the state governments are more bendable by the people than the Federal Government. Their representatives are closer home. Congress can do this if it wants to. The voters must be educated to see that charity begins at home where the spending of inheritance and income taxes are involved. The states practically gave what remaining sovereignty they had to the Federal Government when they amended the Constitution to compel their own people to submit to a federal income tax. They should now make the Federal Government submit to returning it to the states, except for common defense. The general welfare belongs at home. Otherwise it should be repealed.

The states have no peaceful alternative. The only course they can take is elect—not people who want to tax to spend to elect—but people who love their states not less than the Union, who can see that liberty lies in maintaining the sovereignty of the states under the Tenth Amendment, regardless of the force and effect of the income tax article, and that the very life of the Union depends on maintaining the freedom of the states and of the people from a federal totalitarianism. And that includes a Welfare State.

Liberty lies with the people at the polls. But only so long as elections remain free and people love liberty more than security.

It was Patrick Henry, "The Embodiment of Liberty", who foresaw that we might foolishly dissipate our means for "general welfare" and have neither means nor manhood left for common defense. He suspected, as did Benjamin Franklin, that people who traded liberty for "security" deserved neither and lost both. He feared the time might come when the Federal Government might remember no part of the Preamble but the "more perfect union" and the "general welfare", and forget "to secure the blessings of liberty to ourselves and our posterity".

It is time for us to remember at the polls these self-evident truths:

A marshal plan for the American people is no charter of liberty: it is the palsy of prosperity; a blue print for totalitarian government and oppression.

When we burn all the oil in the lamp, the light will go out.

We need both Washington and Henry in the hearts of our countrymen.

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